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# Balancing the Right to Data Protection and the Right of Access to Documents

A Study of the Conflicts Between Regulation 45/2001 and Regulation  
1049/2001

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# Summary

The conflict between the right to data protection and the right of access to documents is mirrored in the Regulations embodying these rights, as they appear to have conflicting end-goals. The two main conflicts are, first, between the Article 8 of Regulation 45/2001 and the Article 6(1) of Regulation 1049/2001, and second, between the Article 4(1)(b) of Regulation 45/2001 or the principle of purpose limitation that is codified therein, and again the Article 6(1) of Regulation 1049/2001.

While the CJEU has addressed these conflicts to some extent, some unclarities remain. The institutions can, in principle, give the access to the documents while blanking out any personal data therein, and should the applicant request its disclosure, he or she must first establish its necessity. The approach of the Court to the “legitimate interests of the data subject” is less clear, although the end result appears to lead to considerations of the effects of the disclosure to the right to privacy of the data subject, due to the overlap between the right to data protection and the right to privacy.

The Courts have been even less clear with the principle of purpose limitation, with only a handful cases even remotely mentioning it, or the Article it is codified in. In order to evoke the principle, it is the obligation of the controller to prove that the further processing requested is incompatible with the purpose for which the data was collected for. However, seeing as a different purpose is not necessarily incompatible with the original one, the question remains regarding the scope and purpose of this principle within the field of EU law.

# Preface

My interest to research and write about this topic formed while researching and preparing for the European Law Moot Court Competition which I was lucky enough to take part in during my last year in the European Business Law master program. While I was not completely unfamiliar with the right to data protection, those hours discussing and dissecting the right, its scope and implications, gave me the basis for both knowledge and interest that saw me through the process of writing this thesis.

I am extremely thankful for everyone who has been there for me during this process, but a few special thank yous are in place.

First, I want to thank my supervisor Xavier Groussot for his guidance and clarifications during the writing my thesis and taking the time for giving me invaluable feedback.

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*Kia Runeberg*  
May 2018

# Abbreviations

|                           |   |
|---------------------------|---|
| Access Regulation         | Regulation 1049/2001  |
| Convention 108            | Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data |
| CFI                       | Court of First Instance of the European Union (now General Court)                                 |
| CJEU                      | Court of Justice of the European Union  |
| Data Protection Directive | Directive 95/46/EC  |
| ECHR                      | Convention for the Protection of Human Rights and Fundamental Freedoms                            |
| ECtHR                     | European Court of Human Rights  |
| EDPS                      | European Data Protection Supervisor   |
| EU                        | European Union  |
| GC                        | General Court (of European Union)   |
| GDPR                      | Regulation 2016/679   |
| Personal Data Regulation  | Regulation 45/2001  |
| TEC                       | Treaty on European Communities  |
| TEU                       | Treaty on European Union (Lisbon)   |
| TFEU                      | Treaty on the Functioning of the European Union (Lisbon)  |
| The Charter               | The Charter of Fundamental Rights of the European Union   |

# 1 Introduction

## 1.1 Background

The term ‘fundamental rights’ was first coined by the Court of Justice when discussing human rights in the scope of EU law. The development of the rights, in the scope of EU law, began when the CJEU affirmed their place among the general principles of the Union law, and developed over years to be embodied in legislative documents, all the way up to the formal legal adoption of the Charter of Fundamental Rights, which protects these rights on the level of primary law, following the changes brought by the Treaty of Lisbon.

Such expansion of the rights, both by the legislative instruments as well as the interpretation of the CJEU regarding their substance and scope, leaves much space for conflicting interests being protected by separate, or sometimes even the same, rights. This thesis will focus in particular on the rights of data protection, privacy and the right of access to (Union) documents, and the conflicts therein.

The right to data protection covers the rights of individual regarding the fair and legitimate processing of his or her personal data, that is, the data from where he or she is, or can be, identified from. Due to the development of this particular right, it shares a connection, to some extent, with the more traditional right to private life, which can be seen as representing one of the core reasons for the existence of the rules on data protection.

The right of access to documents gives a form to the obligations of openness and transparency in regard to the Union institutions and bodies. It was coined to foster public trust in the Union and its decision making by giving access to anyone residing in the Union to most of the documents of the institutions, save for where the specific exceptions apply.

Even from such a short explanation, it appears clear that these two interests are conflicting, as the former rights aims to protect and cover (personal) information and prevent its disclosure to third parties, while the latter aims at opening up the information and ensuring widest possible access to it.

## 1.2 Purpose

The purpose of this thesis is, first, to establish whether there exist conflicts between the right to data protection and the right of access to documents, with the main attention of the writing focusing to the specific secondary law instruments that embody these rights.

Second, this thesis will study and assess the approach to these conflicts by the Court of Justice, to find the position of that Court in regard to these rules, and find whether there remain issues to be resolved, in one way or another, and offer some clarifications and suggestions on how these issues could be approached in the future.

Thus, the relevant questions that will be addressed are

1. Whether there exist conflicts between the two Regulations mentioned?
2. How should these conflicts be resolved?

## 1.3 Method

The methods used for the research of this thesis comprise, in the manner of the hermeneutic method,<sup>1</sup> of research of legislative instruments, the case-law regarding them by the Court of Justice and the General Court of European Union, as well as relevant academic sources, such as books and articles. Attention was given

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<sup>1</sup> Van Hoecke, M. (2011) *Methodologies of legal research. [Elektronisk resurs]: what kind of method for what kind of discipline?* Oxford: Hart, 2011. p.4



especially to the interpretation of the scope and connections between the rights, as well as of the relevant provisions of the instruments discussed.

Other documents, especially by the Union institutions and bodies, as well as the Council of Europe, are also analysed for a wider understanding of the rights and issues at hand.

## **1.4 Delimitation**

For the purposes of this thesis, while there is a discussion of the fundamental rights in their entire scope, the main focus will remain in the specific legal instruments concerning the obligations of the EU institutions and bodies, Regulation 45/2001 and Regulation 1049/2001. Other legal instruments, especially in the field of data protection, will also be addressed due to the lack of the interpretation by the Courts regarding Regulation 45/2001, but the obligations of the Member States either under the Data Protection Directive, or the GDPR, are in general not addressed.

This thesis will further exclude the right to expression and information protected under Article 11 of the Charter. While it is sometimes connected to the right of access to documents, the main basis of the right of access is nevertheless separate from it.

## **1.5 Outline**

The main focus of the thesis is, albeit as limited by the scope and provisions of the Regulations mentioned, the fundamental rights as protected by the Charter. For this reason, the Chapter 2 will grant a brief overview of both the development of the fundamental rights in general, as well as of the specific rights that will be further discussed, in order to grant the reader a context for those rights. Chapter 2 will also address conflicts of fundamental rights in general, providing for a definition of a conflict, as well as an overview of the approach of the Court of Justice in general.

Chapter 3 establishes the specific conflicts between Regulation 45/2001 and Regulation 1049/2001 that will be discussed, as well as presents the relevant definitions.

Chapter 4 provides for, first, the analysis of the case-law of the CJEU regarding these conflicts, addressing the relevant cases as well as the two steps provided by both the legislation itself as well as the CJEU in order to resolve these conflicts. This Chapter will also suggest clarifications to the approach, highlighting especially the link between the right to data protection and the right to privacy in the context of these conflicts.

Finally, conclusions are presented.

# 2 Fundamental Rights in the European Union

## 2.1 Fundamental Rights Before the Charter

The fundamental rights were first introduced to the sphere of EU law by the Court of Justice of the European Union (CJEU) in the *Stauder* case,<sup>2</sup> where the Court stated that fundamental human rights were enshrined in the general principles of Union law. These rights were not codified on the level of EU law in any manner before this judgement.<sup>3</sup> The *Stauder* case acted as a floodgate, and by opening it the CJEU opened the doors for cases concerning fundamental rights.

The year following the *Stauder* judgement, the Court elaborated the sources of the fundamental rights in the *Internationale Handelsgesellschaft* case,<sup>4</sup> where the CJEU stated that the protection of these rights, “whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community”.<sup>5</sup> In that case, while naming the constitutional traditions of the Member States as a source of fundamental rights, the CJEU firmly stated that the evaluation of those rights, when concerning Union law, must be done under the legal system of the Union law itself, and cannot be affected by allegations of a measure being contrary to the rights on the level of the national jurisdiction.<sup>6</sup>

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<sup>2</sup> C-29/69 *Stauder v City of Ulm* EU:C:1969:57, §7

<sup>3</sup> Five out of the six Member States had ratified and entered into force the ECHR prior to 1969. The ratification and subsequent entry into force in France wasn't until 1974, although it had signed the Convention already in 1952. ([https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/signatures?p\\_auth=NukS0sbR](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/signatures?p_auth=NukS0sbR), accessed 23.05.2018)

<sup>4</sup> C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114

<sup>5</sup> *Ibid* §4

<sup>6</sup> *Ibid* §3

The CJEU expanded the sources of the fundamental rights in the *Nold* case,<sup>7</sup> stating that they included both the constitutional traditions common to the Member States, as well as international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.<sup>8</sup> The trend of naming further sources continued in following years with *Rutili*,<sup>9</sup> where the CJEU for the first time mentioned the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as a source when discussing fundamental rights.<sup>10</sup> In the *Hauer* case, the CJEU made a further reference to ECHR, as well as to the constitutions of (then nine) Member States with the regard to the right to property.<sup>11</sup>

This protection of the fundamental rights as part of general principles of Union law, probably partly due to the lack of an EU bill of rights or something similar, could be seen as stemming from, on the other hand, the concerns of the Member States, especially Germany, in regard to the sufficient level of protection of these rights, and the need of the CJEU to ensure the supremacy of EU law, on the other. For example, the German Constitutional Court has stated in its judgements that EU law has supremacy over national law, but only as long as the EU ensures effective protection of fundamental rights.<sup>12</sup>

## 2.2 Fundamental Rights After the Adoption of the Charter

The Charter of Fundamental Rights was solemnly and formally proclaimed by the European Communities on 7 December 2000 as a non-legally binding document

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<sup>7</sup> C-4/73 *Nold v Commission* EU:C:1974:51

<sup>8</sup> *Ibid* §13. The CJEU has held these treaties to include, among others, the ECHR. Further, for example in the case C-149/77 *Defrenne v Sabena* (EU:C:1978:130) the Court referenced the European Social Charter in §28

<sup>9</sup> C-36/75 *Rutili v Ministre de l'intérieur* EU:C:1975:137

<sup>10</sup> *Ibid* §32

<sup>11</sup> C-44/79 *Hauer v Land Rheinland-Pfalz* EU:C:1979:290, §§17-20

<sup>12</sup> Craig, P. P., & De Burca, G. (2011). *EU law: text, cases, and materials* (5th ed.). Oxford University Press. p.274-275

codifying the fundamental rights previously covered by the general principles of the Union law. The legal status of the Charter in 2000 was left at the level of legally non-binding ‘solemn proclamation’, which constituted merely a political declaration on the position of the EU regarding the fundamental rights.<sup>13</sup> This was done rather deliberately to answer both the growing need for a “constitutional” codification of the fundamental right on the level of the EU, and the need to leave it undetermined on the face of the series of constitutional changes that the EU had begun.<sup>14</sup>

The Charter was originally supposed to constitute the second part of the Constitutional Treaty<sup>15</sup> but remained non-binding after the failure to ratify that Treaty in 2005. That did not prevent the General Court (GC), the Advocate Generals nor the CJEU from referring to the Charter in its non-binding form as a basis for some of their reasoning, and as a reaffirmation of the fundamental rights, already found from the “constitutional traditions and international obligations common to the Member States”.<sup>16</sup>

The Charter finally became legally binding after the adoption of the Treaty of Lisbon on 1 December 2009. Whereas the Charter was first meant to form part of the text of the Constitutional Treaty, under the Treaty of Lisbon it remained a separate document, that was brought to the sphere of Union primary law by Article 6(1) of the Treaty on European Union (TEU), which reads:

*“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”*

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<sup>13</sup> de Witte, B. (2001). The legal status of the charter: Vital question or non-issue. *Maastricht Journal of European and Comparative Law* 8(1), 81-89. page 82

<sup>14</sup> Craig & De Burca, EU law: text, cases, and materials. (n.12). p.394

<sup>15</sup> Treaty Establishing the Constitution for Europe

<sup>16</sup> See, for example, C-540/03 *Parliament v Council* EU:C:2006:429 §38

Article 6(2) TEU, also added by the Treaty of Lisbon, further creates the obligation for the EU to accede to the ECHR. This Article was supposed to settle the long debate on whether the Union should accede to the Convention,<sup>17</sup> but has not, in fact, fully succeeded in doing so. The CJEU ruled in its Opinion 2/13<sup>18</sup> in December 2014 that the Draft Accession Agreement was incompatible with the Treaties,<sup>19</sup> and could therefore not proceed. This was a surprising turn of the events since the submissions of all of the other parties concluded that the Agreement would be compatible,<sup>20</sup> and the Advocate General merely recommended that the CJEU should approve the Agreement as it “requires some relatively minor modifications or additions, which should not be too difficult to secure”.<sup>21</sup> While this created tensions between the two Courts, and indeed made many questions whether an accession would be possible at all, the Commission has continued on working on the accession,<sup>22</sup> and its future is still open.

## 2.3 The Right to Protection of Personal Data

The right to the protection of personal data, as enshrined now in both Article 16 of the Treaty on the Functioning of the European Union (TFEU) and Article 8 of the Charter, is a relatively new fundamental right. In many national and international jurisdictions, it is treated as a subsequent or a follow-up right to the right to private life, and the processing of personal data, therefore, has to be assessed in the light of the potential issues with the private life of the individual in question.

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<sup>17</sup> Craig & De Burca, EU law: text, cases, and materials. (n.12). p.399

<sup>18</sup> Avis 2/13 *Adhésion de l'Union à la CEDH* EU:C:2014:2425

<sup>19</sup> Avis 2/13 *Adhésion de l'Union à la CEDH*, §258

<sup>20</sup> Storgaard, L. H. (2015). EU Law Autonomy versus European Fundamental Rights Protection – On Opinion 2/13 of EU Accession to the ECHR [article]. *Human Rights Law Review*, (3), p.491

<sup>21</sup> Avis 2/13 *Adhésion de l'Union à la CEDH*, View of Advocate General Kokott, EU:C:2014:2475, §278

<sup>22</sup> Commission Work Programme 2017 Delivering a Europe that protects, empowers and defends, COM(2016) 710 final p.12, however the 2018 Work Programme does not mention the accession, and instead focuses on strengthening the mutual trust within the Union, as well as Completing the Security Union. See Commission Work Programme 2018 An agenda for a more united, stronger and more democratic Europe, COM(2017) 650 final, p. 6 and 7

The term ‘data protection’ can be defined as, for example, “[u]se of techniques [...] to ensure the availability and integrity of the data.”<sup>23</sup> However, as Paul De Hert and Serger Gutwirth noted, “it is impossible to summarise data protection in two or three lines. Data protection is a catchall term for a series of ideas with regard to the processing of personal data”.<sup>24</sup>

The right to data protection generally includes both obligations on the processing of personal data by both the controller<sup>25</sup> and the processor,<sup>26</sup> as well as rights conferred upon the data subject, such as the rights to access the personal data and, for example, the “right to be forgotten” as confirmed by the Court of Justice of European Union (CJEU) in the case *Google Spain*.<sup>27</sup>

The EU has harmonised the field of data protection to a considerable extent. In the Member States, and concerning Union citizens, the processing is regulated by, for example, the Directive 95/46/EC (the Data Protection Directive),<sup>28</sup> which will be replaced on 25 May 2018 by Regulation 2016/679 (the General Data Protection Regulation, or the GDPR),<sup>29</sup> and the Directive 2002/58/EC (the ePrivacy

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<sup>23</sup> Definition from <http://www.businessdictionary.com/definition/data-protection.html> (Accessed 17.05.2018)

<sup>24</sup> De Hert P. & Gutwirth S. (2009) ‘Data Protection in the Case Law of Strasbourg and Luxemburg: Constitutionalisation in Action’ in Gutwirth S., Y. Pouillet, P. De Hert, J. Nouwt & C. De Terwangne (Eds), *Reinventing data protection?*, Dordrecht: Springer Science, p. 3

<sup>25</sup> The Article 2(d) of Regulation 45/2001 defines ‘controller’ as the “entity which alone or jointly with others determines the purposes and means of the processing of personal data”

<sup>26</sup> The Article 2(e) of Regulation 45/2001 defines ‘processor’ as the “natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller”

<sup>27</sup> C-131/12 *Google Spain and Google*, EU:C:2014:317, §99. Now also protected by the Article 17 of the GDPR.

<sup>28</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31

<sup>29</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1

Directive).<sup>30</sup> The single instrument directly aimed towards the EU institutions and bodies is Regulation 45/2001 (Personal Data Regulation).<sup>31</sup>

## **2.3.1 Development of the Right to Protection of Personal Data**

As mentioned above, the right to data protection is a relatively new right compared to other fundamental rights. It started to develop as a subset to the right to privacy in the 1970's due to the growing concerns of the effects that the digitalisation of, among other things, the data banks would have to the privacy of an individual.

### **2.3.1.1 The Right to Data Protection Before the Charter of Fundamental Rights**

Before the adoption of the Charter, the fundamental rights, including the right to protection of personal data, were mainly founded from two different type of sources by the CJEU: first, the “general principles of Community law”, and second, other secondary sources used as sources of inspiration.<sup>32</sup> This meant that the scope of the right to data protection depended on those sources, and at the time it was heavily connected to the right to privacy.

Data protection as a right seems to have started to emerge in the 1970s when the number of databases used by primary governmental organisations started to raise multiple issues with the more traditional right of private life.<sup>33</sup> For example in the

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<sup>30</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201/37

<sup>31</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 8/1

<sup>32</sup> Rosas, A. (2015). Five Years of Charter Case Law: Some Observations. In S. de Vries, U. Bernitz & S. Weatherill (Eds.). *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Studies of the Oxford Institute of European and Comparative Law, pp. 11–20). Oxford: Hart Publishing. p.11

<sup>33</sup> Van der Sloot, B. (2017). Legal Fundamentalism: Is Data Protection Really a Fundamental Right? In *Data Protection and Privacy: (In)visibilities and Infrastructures* (Vol. 36, Law, Governance and Technology). Springer.



United Kingdom, the first governmental response to the need for data protection measures, the Privacy White Paper published in 1975,<sup>34</sup> stated that “the time has come when those who use computers to handle personal information [...] can no longer remain sole judges of whether their own systems, adequately safeguard privacy”.<sup>35</sup>

The first instruments specifically dealing with data protection in European level were also explicitly linked to the right to privacy, with the Council of Europe’s Resolutions regarding electronic data banks in the private<sup>36</sup> as well as the public sector,<sup>37</sup> adopted respectively in 1973 and 1974. The adoption of these Resolutions was due to the Council of Europe concluding that, in the light of new technology and partial digitalisation, the protection offered by Article 8 of the ECHR was not adequate.<sup>38</sup> The Council of Europe further addressed these concerns in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, (Convention 108)<sup>39</sup> adopted in 1981, and which has been ratified by all of the Member States of the EU and all of the Members of the Council of Europe,<sup>40</sup> as well as few non-Members.<sup>41</sup>

The Convention 108 defines ‘personal data’ as “any information relating to an identified or identifiable individual (‘data subject’)”.<sup>42</sup> Following this definition,

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<sup>34</sup> Great Britain, Home Office, *Computers and Privacy*, Cmnd. 6353 (London: HMSO, 1975)

<sup>35</sup> *Ibid*, §30

<sup>36</sup> Council of Europe, Resolution (73)22 on the Protection of the Privacy of Individuals *vis-à-vis* Electronic Data Banks in the Private Sector (Adopted by the Committee of Ministers on 26 September 1973 at the 224<sup>th</sup> meeting of the Ministers’ Deputies)

<sup>37</sup> Council of Europe, Resolution (74)29 on the Protection of the Privacy of Individuals *vis-à-vis* Electronic Data Banks in the Public Sector (Adopted by the Committee of Ministers on 20 September 1974 at the 236<sup>th</sup> meeting of the Ministers’ Deputies)

<sup>38</sup> Hustinx, P. (2013) *EU Data Protection Law: The Review of Directive 95/46/EC and the Proposed General Data Protection Regulation*, available at [https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2014/14-09-15\\_Article\\_EUI\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2014/14-09-15_Article_EUI_EN.pdf) page 4

<sup>39</sup> Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28.1.1981

<sup>40</sup> Turkey being the last Member of the Council of Europe to ratify and enter the Convention into force in 2016 ([https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures?p\\_auth=0kssSS5V](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures?p_auth=0kssSS5V), visited 5/5/2018)

<sup>41</sup> The Convention 108 has been ratified by Mauritius, Senegal, Tunisia and Uruguay.

([https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures?p\\_auth=0kssSS5V](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures?p_auth=0kssSS5V) 5/5/2018)

<sup>42</sup> Article 2 sub a of the Convention 108

data protection goes further than the protection of the private life of the individual, as the data concerned by the Convention 108, and other after it, is not merely data that are particularly sensitive or that have connection to the privacy of the individual, but all manners of personal information.

In 1990 the Commission's growing concern on the lack of harmonious data protection rules within the Union lead to it stating in its Communication<sup>43</sup> that the Convention 108 was the only international legal instrument currently in place, and that it left open "a large number of options for the implementation of the basic principles it contains, and it has been ratified by only seven Member States, of which one still has no domestic legislation", and that this diversity of the approaches between the Member States "are an obstacle to the completion of internal market". This concern lead to the proposal, and subsequent adoption of the Data Protection Directive, which aimed to protect the fundamental rights of the individuals as well as to ensure free flow of personal data between the Member States.<sup>44</sup>

The Data Protection Directive, as well as the ePrivacy Directive and Data Retention Directive,<sup>45</sup> were legally based on what was then Article 95 EC (now Article 114 TFEU), which gave the Community legislator the right to adopt measures "which have as their object the establishment and functioning of the internal market". Thus, the reasoning behind the legal instruments was not fully concerned with fundamental rights, and they had also economic considerations. This was partially because the right to data protection was not codified on the Treaty level, save for Article 286 EC which extended the scope of the Community acts regarding processing of personal data to apply to the institutions and bodies of the EU.<sup>46</sup>

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<sup>43</sup> COM(90) 314 final – SYN 287 and 288, 13 September 1990. Commission Communication on the protection of individuals in relation to the processing of personal data in the Community and information security

<sup>44</sup> Article 1 of the Directive

<sup>45</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, which was later invalidated by the CJEU in Joined cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* EU:C:2014:238 §§69-71

<sup>46</sup> Kranenborg, H. (2014). Protection of Personal Data. In S. Peers, T. Hervey, J. Kenner & A. Ward (Eds.). *The EU Charter of Fundamental Rights: A Commentary* (pp. 223–266). London: Hart Publishing. page 224

It should be noted that the scope of the Data Protection Directive was left broad and does not necessarily require an actual link to the free movement between Member States to apply, as ruled by the CJEU in the case *Österreichischer Rundfunk*.<sup>47</sup> This was meant to ensure wide harmonisation in the laws of the Member States to fully facilitate the free movement of personal data between them.

### **2.3.1.2 The Right to Data Protection After the Adoption of the Charter**

The most significant change brought by the Charter to the right to protection of personal data was the separation of that right from the right to privacy. Whereas the right to data protection had previously been treated either as a part of the right to privacy, or a follow-up obligation resulting from that right, the Charter enshrined it separately from that right in Article 8, which reads:

- “1. Everyone has the right to the protection of personal data concerning him or her.*
- 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
- 3. Compliance with these rules shall be subject to control by an independent authority.”*

Further, the Treaty of Lisbon included the new Article 16 TFEU, which modified Article 286 EC and together with Article 8 of the Charter, which reads forms the current legal basis for the individuals’ right to data protection.

The GDPR constitutes the greatest change by Union legislation after the adoption of the Charter after it formally replaces the Data Protection Directive on 25 May

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<sup>47</sup> Joined cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* EU:C:2003:294 §§41-42

2018. It is meant to equalize the data protection rules by being directly applicable everywhere within (and to some extent outside) the Union, creating more legal certainty and removing obstacles to the free flow of personal data.<sup>48</sup> The key changes the new Regulation will bring are mainly related to the right to the data subjects, such as formalising the “right to be forgotten” granted by the CJEU in the now infamous Google Spain case,<sup>49</sup> as well as the rights to transparent information, the right to data portability, and strengthening the data subject’s rights in relation of the control of their personal data in general.<sup>50</sup>

The real effects of the GDPR remain to be seen as the implementation period draws to an end.

### 2.3.2 Connection to the Right to Private Life

As explained before, the right to data protection started to develop from the growing concerns of how the new ways of processing and storing data would affect the privacy of individuals, both in the private and in the public sphere. For example, the Council of Europe’s 1974 Resolution in regard to the electronic data banks in the public sector states that “the use of electronic data banks by public authorities has given rise to increasing concern about the protection of the privacy of individuals”.<sup>51</sup> Later, in the Convention 108, the Council of Europe continued to attach the right to data protection to the right to privacy in both the Preamble for the Convention, as well as in the text of Article 1 of that Convention.

In the sphere of EU law, the first legislative instrument concerning the right to data protection, the Data Protection Directive, was based primarily on the general notion

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<sup>48</sup> Voigt, P., & von dem Bussche, A. (2017). *The EU General Data Protection Regulation (GDPR) [Elektronisk resurs]: A Practical Guide*. Cham: Springer International Publishing: Imprint: Springer, 2017. p.2

<sup>49</sup> C-131/12 *Google Spain and Google* (n.27), especially §§92-94. This right is now further codified by the Article 17 GDPR.

<sup>50</sup> Burri, M., & Schär, R. (2016). The Reform of the EU Data Protection Framework: Outlining Key Changes and Assessing Their Fitness for a Data-Driven Economy. *Journal of Information Policy*, 6, p.491

<sup>51</sup> Preamble of the 1974 Resolution.

of the fundamental rights of individuals, with a special emphasis on the right to privacy. These rights were derived from, according to the Recital 1 of the Directive, directly from the constitution and laws of the Member States, and from the ECHR.

However, there exists a difference in the approach of the EU to other international documents, which is partially due to the specifics of the Union itself. While the Data Protection Directive is strongly connected to the right to privacy, the right to data protection is, due to the fact of the Union traditionally acting in the economic interests of the internal market, partly treated as an economic matter by the EU.<sup>52</sup>

Furthermore, in many national jurisdictions of the Member States, the right to data protection is not recognised as a separate right,<sup>53</sup> and rather flows from the right to privacy, such as is seen, for example, in the constitutions of Finland and Spain.<sup>54</sup>

The Charter was the first document to formally separate the right to data protection from the right to private life. While the Charter's preamble states that it was meant to 'reaffirm' the rights as they result from the various sources as discussed in Chapter 2.1, the right to data protection, as mentioned in the Explanations to the Charter,<sup>55</sup> is based on the Data Protection Directive, Article 286 EC, Article 8 ECHR and the Convention 108, all of which are based either on the right to privacy or, in the case of Article 286 EC, an obligation of the institutions and bodies to

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<sup>52</sup> Van der Sloot, Legal Fundamentalism: Is Data Protection Really a Fundamental Right? In *Data Protection and Privacy: (In)visibilities and Infrastructures* (n.33). p. 6-7

<sup>53</sup> It is recognised in, for example, the constitutions of Sweden and Netherlands. See Irion, K. & Luchetta, G. (2013). *Online Personal Data Processing and EU Data Protection Reform*. CEPS Task Force Report, April 2013, p.11

<sup>54</sup> The Finnish constitution sets down in section 10, concerning the protection of private life, that "Everyone's private life, honour and the sanctity of the home are guaranteed. More detailed provisions on the protection of personal data are laid down by an Act" (<https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>), while the Spanish constitution, in its section 18, declares that the use of data processing shall be restricted "in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights" ([http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist\\_Normas/Norm/const\\_esp\\_a\\_texto\\_ingles\\_0.pdf](http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_esp_a_texto_ingles_0.pdf))

<sup>55</sup> Which by themselves are not legally binding, but offer a 'valuable tool of interpretation intended to clarify the provisions of the Charter'. See, Explanations Relating to the Charter of Fundamental Rights, OJ C 202/17, and, for example, Lenaerts, K. (2012). Exploring the Limits of the EU Charter of Fundamental Rights. *European Constitutional Law Review*, 8(3), p.401-402

follow the data protection legislation. The Charter does not offer a proper explanation either for the separation of the two rights, or their relationship.<sup>56</sup>

The relationship of these rights has raised a lot of discussion with varying opinions to both directions. For the purposes of this thesis, the focus will be on the three different models Lynskey presents in her book:

Model 1 supposes that both data protection and privacy are complementary tools serving the grand aim of respecting human dignity,<sup>57</sup> Model 2 supposes that data protection is merely the most recent form of the right to privacy,<sup>58</sup> and the Model 3 supposes that the right to data protection is an independent right that “overlaps considerably with the right to privacy, as they both ensure informational or data privacy, but data protection serves a number of purposes that privacy does not and vice versa”.<sup>59</sup>

Under EU law the most suitable model would be the Model 3. While the right to data protection and the right to privacy serve multiple similar or same purposes, the right to data protection has a different scope. The right to privacy goes beyond the data protection, protecting the ‘personal space’ of the individual, including things such as private, family and home life, while the protection of personal data aims at giving the individual’s the rights to know how their personal data is processed, and that such processing is under defined safeguards.<sup>60</sup> The CJEU has further endorsed this view in, for example in the *ClientEarth* case, where it stated that there is a difference between the concepts of ‘personal data’ within the meaning of the Personal Data Regulation, and ‘data relating to private life’.<sup>61</sup> Thus it appears that

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<sup>56</sup> Lynskey, O. (2015). *The foundations of EU data protection law*. Oxford: Oxford Univ. Press. p.90.

<sup>57</sup> *Ibid*, p.94

<sup>58</sup> *Ibid* p.102. See also Solove, D. J. (2004). *The digital person: technology and privacy in the information age*. New York: New York University Press, cop. 2004. p.75

<sup>59</sup> Lynskey. *The foundations of EU data protection law* (n.63). p.103

<sup>60</sup> Kuner, C. (2009). An international legal framework for data protection: Issues and prospects. *Computer Law & Security Review*, 25(4) p.308-309

<sup>61</sup> C-615/13 P *ClientEarth* (n.57), §32

these two rights have overlapping, but not identical, scopes, as not all personal data is by its nature private.<sup>62</sup>

This is also reinforced by the fact that the GDPR appears to have erased all references to the right to privacy from the text of Regulation, substituting them either with references to the right to protection of personal data or more generally with references to “fundamental rights”. This appears to disconnect the two rights, at least textually,<sup>63</sup> although the effect in the reasoning of the CJEU remains to be seen.

### 2.3.2.1 In the Case-Law of the Court of Justice

The case law of the ECtHR regarding Article 8 ECHR and the right to privacy has greatly affected the way the CJEU has interpreted data protection rules under EU law.<sup>64</sup> In the first case directly dealing with the right to data protection, the *Österreichischer Rundfunk*, the CJEU considered the effects to the right to private life that the national legislation in question, which was implementing the Data Protection Directive, would have. It refers to both Article 8 of the ECHR, as well as to multiple cases from the ECtHR, such as the *Aman v Switzerland* and *Rotaru v Romania*.<sup>65</sup>

The connection to the right to privacy continued in the subsequent case-law, such as in *Promusicae*,<sup>66</sup> where the Court stated that the situation in that case concerned not only the two rights submitted by the national court, but also a “further fundamental right, namely the right that guarantees the protection of personal data and hence of private life” (emphasis added).

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<sup>62</sup> Tzanou, M. (2017). *The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance*. [Elektronisk resurs]. Hart Publishing Limited 2017. p.23. See also the reasoning of the General Court in T-194/04 *Bavarian Lager v Commission* EU:T:2007:334, §§118-119

<sup>63</sup> Van der Sloot, Legal Fundamentalism: Is Data Protection Really a Fundamental Right? In *Data Protection and Privacy: (In)visibilities and Infrastructures* (n.33). p.7

<sup>64</sup> Kranenborg. Access to Documents and Data Protection in the European Union: On the Public Nature of Personal data. (n.54) p.1085.

<sup>65</sup> C-465/00 *Österreichischer Rundfunk* (n.47) §73

<sup>66</sup> C-275/06 *Promusicae* EU:C:2008:54, §63

The approach of the CJEU started to change, to an extent, after the Charter became legally binding. Instead of treating the now textually separated two rights as completely dependent rights, it deals with them separately. Thus, for example in the judgement in the case *Volker*, the CJEU considered interferences with both of the rights separately.<sup>67</sup> It has since then, at least in majority of the cases, taken a similar approach.<sup>68</sup>

However, the CJEU has also held, for example in the *Tele2 Sverige* case, that the protection of the right to privacy requires that the “derogations from and limitations on the protection of personal data should apply only in so far as is strictly necessary”.<sup>69</sup> This phrasing indicates that the Court still considers, at least to some extent, that these two rights are linked, or at the very least overlapping with their end-goals. Thus, the rules for processing personal data could be seen, to some extent, to exist to ensure the privacy of the data subject.

### **2.3.3 Regulation (EC) 45/2001**

The Personal Data Regulation was adopted by the European Parliament and the Council on 18 December 2000, just 11 days after the proclamation of the non-binding Charter of Fundamental Rights, pursuant to Article 286 EC. The textual interpretation of Article 286(1) EC, which reads as follows:

*“1. From 1 January 1999, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty.”*

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<sup>67</sup> Joined cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, §§56-64

<sup>68</sup> For example, C-293/12 *Digital Rights Ireland* (n.45) §§29-30 and C-362/14 *Schrems* EU:C:2015:650, §39

<sup>69</sup> Joined cases C-203/15 and C-698/15 *Tele2 Sverige* EU:C:2016:572, §96 and the case law referenced. This seemed to also be the case in C-291/12 *Schwarz* EU:C:2013:670, §§24-26, where the Court considered the issue with reading the Articles together.



appears to imply that the Data Protection Directive, adopted in 1995 and already in force at the time of the adoption of this Article in the Treaty of Amsterdam, would be automatically applicable towards the Union institutions and bodies, although this remained questionable.<sup>70</sup> Regardless, the legislator adopted Regulation 45/2001 to implement substantive rules regarding data protection that were directly addressed the Community institutions and bodies.

The Personal Data Regulation further established the position of the European Data Protection Supervisor (EDPS) pursuant to Article 286(2) EC, which reads

*“2. Before the date referred to in paragraph 1, the Council, acting in accordance with the procedure referred to in Article 251, shall establish an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies and shall adopt any other relevant provisions as appropriate.”*

This thesis will not focus on the role of the EDPS, so it is sufficient to merely note that the role of the Data Protection Supervisor is, according to Article 41 of the Personal Data Regulation, to ensure the respect of the fundamental rights and freedoms of the natural person, and especially the right to privacy, are respected by the Community institutions and bodies. This mirrors the obligations of the Member States to provide independent supervisory authorities in accordance with Article 28 of the Data Protection Directive.<sup>71</sup>

### **2.3.3.1 The Substantive Rules**

The Personal Data Regulation applies, pursuant to its Article 3, to all processing of personal data by the EU institutions and bodies “insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of

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<sup>70</sup> Hijmans, H. 'The European data protection supervisor: the institutions of the EC controlled by an independent authority' (2006) 43 *Common Market Law Review*, Issue 5, p 1313.

<sup>71</sup> As the latest implementation day of the GDPR is 25 May 2018, this obligation will henceforth be laid down in the Article 51 GDPR. The GDPR also establishes the new European Data Supervision Board pursuant to its Article 68 to ensure the consistent application of the Regulation.

Community law”, and to the extent the processing is done wholly or partly by automatic means. Before the Treaty of Lisbon, the scope was limited formally to the First Pillar of the Three-Pillar structure, that is, to the personal data processed in lieu of activities of the European Communities,<sup>72</sup> although the application also stretched to the activities that fell partly within the scope of the Community law.<sup>73</sup> With the abolition of the pillar structure, the application of the Regulation appears to cover all acts of processing personal data by the Union institutions and bodies, although there is an unclarity whether it covers processing done in the field of CFSP, for example.<sup>74</sup>

The Regulation includes definitions for concepts such as ‘personal data’, ‘processing’ and ‘processor’, which are identical to other pieces of data protection legislation, such as the Data Protection Directive.<sup>75</sup>

In *ClientEarth* the CJEU held, despite the claims of the applicants on the contrary, that the definition of personal data within the meaning of Article 2(a) of the Personal Data Regulation, includes information provided as part of professional activity, whether or not the names of those who submitted that information were published online.<sup>76</sup> This means that the Union documents falling within the scope of the Personal Data Regulation include all types of documents with any manner of personal data, whether that was provided by the individual either in private or professional context.

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<sup>72</sup> The Three-Pillar structure was introduced by the Treaty of Maastricht in 1993, and abolished by the Treaty of Lisbon in 2009. The First Pillar comprised of the European Communities and handled the economic, social and environmental policies. The Second Pillar regarded the Common Foreign and Security Policy, and the Third Pillar the Police and Judicial Co-operation in Criminal Matters.

<sup>73</sup> Kranenborg, H. (2008). Access to Documents and Data Protection in the European Union: On the Public Nature of Personal data. *Common Market Law Review*, 45(4), p.1085.

<sup>74</sup> The EDPS has noted that the Regulation 45/2001 applies to at least in regard to sanctions, such as asset freeze, which are adopted against natural or legal persons. See, for example, ‘Joint Opinion on the notifications for Prior Checking received from the Data Protection Officer of the Council of the European Union regarding the processing of personal data for restrictive measures with regard to the freezing of assets’. Brussels, 07 May 2014 (2012-0724, 2012-0725, 2012-0726).

<sup>75</sup> The definitions in the Article 4 of the GDPR appear to be more specific, adding things such as ‘location data’ and ‘online identifier’ to the list of examples for personal data, as well as new definitions for things such as ‘restriction of processing’ and ‘profiling’. These changes were mirrored and included in the draft for the new Regulation the Commission is proposing to replace the Regulation 45/2001 in order to make it comply with the rules in the GDPR.

<sup>76</sup> C-615/13 P *ClientEarth and PAN Europe v EFSA*, EU:C:2015:489, §§29-31

In order for the processing of personal data to be legitimate, the Regulation sets down several principles. One of the most important of them is the principle of purpose limitation, which is embodied in Article 4(1)(b) of the Regulation, which limits the processing of the data to situations where it is collected for ‘specific, explicit and legitimate purposes’. Article further stipulates that the data should not be processed in a way that is incompatible with the purposes it was originally collected for.

The specific provisions of this Regulation that will be discussed in this thesis are the aforementioned Article 4(1)(b), as well as Article 8 concerning the transfer of personal data subject to the Data Protection Directive.

## **2.4 The Right of Access to Documents**

The right to access to documents is linked to transparency, which especially after the Treaty of Lisbon constitutes one of the important aspects of EU law.<sup>77</sup> The current legal basis for the right for individuals is both Article 15 TFEU, as well as Article 42 of the Charter. There is a further connection to the right to access via the right to information, embodied in Article 11 of the Charter. While the latter right has a strong influence in some of the Member States in regard to the access to documents,<sup>78</sup> it will not be discussed here.

### **2.4.1 Development of the Right of Access**

The CJEU has recognised the right to access file since 1970’s, where it attached the right to access to the rights of defence in cases regarding competition law,<sup>79</sup> such

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<sup>77</sup> Craig & De Burca, EU law: text, cases, and materials. (n.12). p.541-555

<sup>78</sup> This is the case, for example, in Sweden. See Curtin, D.M. (2000). Citizens’ Fundamental Right of Access to EU Information: An Evolving Digital Passepartout? *Common Market Law Review*, 37(1), p.7

<sup>79</sup> Hofmann, H., Rowe, G., & Türk, A.(2011-10-27). Information and Administration. In *Administrative Law and Policy of the European Union*. : Oxford University Press. p.469. See also, for example, Bignami, F. (2004). Three Generations of Participation Rights before the European Commission. *Law and Contemporary Problems*, 68(1), p. 65

as *Chemiefarma*,<sup>80</sup> *Boehringer Mannheim*<sup>81</sup> and *Imperial Chemical Industries*.<sup>82</sup> At the time of these cases, however, the CJEU allowed the Commission to give summaries of the evidence it deemed relevant to the case, rather than giving the parties the right to examine the documents directly. This approach changed in the later 1970's, where in the case *Hoffmann-La Roche v. Commission* the CJEU, for the first time, held that the Commission should have granted the company access to examine the full evidence held against it.<sup>83</sup>

As a right of its own, the right of access to information was first mentioned on the level of EU legislation in the Declaration on the Right of Access to Information, which was annexed to the Treaty of Maastricht,<sup>84</sup> where it was stated that “transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration”. It further urged the Commission to submit a report for the measures that should be designed to improve the public access to information that is available to the institutions of the Union.

It was on this basis that the Council and the Commission jointly adopted a code of conduct concerning public access to documents,<sup>85</sup> according to which the standard for the public access to documents being the “widest possible access”. The code of conduct defined ‘document’ as “any written text, whatever its medium, which contains existing data and is held by the Council or the Commission”. The Council and the Commission further agreed to implement the principles by specific regulation before January 1994.<sup>86</sup>

In all of these documents, the right of access was not absolute. The Council and the Commission both agreed and implemented a set of exceptions to the access of

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<sup>80</sup> C-41/69 *Chemiefarma v Commission*, EU:C:1970:71, §§25-30

<sup>81</sup> C-45/69 *Boehringer Mannheim v Commission* EU:C:1970:73, §§9-10

<sup>82</sup> C-48/69 *Imperial Chemical Industries v Commission* EU:C:1972, §§21-25

<sup>83</sup> C-85/76 *Hoffmann-La Roche v Commission* :EU:C:1979:36, §11

<sup>84</sup> Treaty on European Union (Treaty of Maastricht) [1992] OJ C 325/5, Declaration 17

<sup>85</sup> Council, Code of Conduct concerning public access to Council and Commission documents (93/730/EC), 31 December 1993, OJ L 340/41

<sup>86</sup> Which lead to Council Decision 93/731/EC, 31 December 1993, OJ L 340/44 and Commission Decision 94/90/ECSC, 8 February 1994, OJ L 46/58

documents, which were laid down to include the protection of public interest, the protection of the individual and privacy, the protection of commercial and industrial secrecy, the protection of the Community's financial interest and the protection of requested confidentiality by the person supplying the information or by the legislation of the Member State supplying the information.

At the time the form of the adoption of these rules in the legally non-binding Code of Conduct, and even in the implementing Decisions, was criticised. It did not fall within the usual legislative ways of grounding a new policy, such as a Treaty Article, Regulation or a Directive, nor was it done by a Recommendation or an Opinion.<sup>87</sup> It further did not identify the legal provision it was based upon, a fact which was used as a basis for challenging the Code of Conduct by the government of Netherlands in the case *Netherlands v Council*.<sup>88</sup>

Further criticism was given by, for example, the European Ombudsman in his speech on the topic "The Citizen, the Administration and Community law" given in Stockholm on 6 June 1998,<sup>89</sup> where he addressed briefly the issues with the form of the access to documents and the criticism on the rules under the Decisions adopted by the Union institutions. He especially noted the criticism on the fact that the Decisions did not apply to incoming documents and that the time-limits for the decisions on giving access was too long, and that the exceptions were too restrictive. The use of the exceptions was also challenged in the Courts of the EU, in for example the case *Svenska Journalistförbundet v Council*<sup>90</sup> before the Court of First Instance, where the applicant challenged the Council's denial to grant it access to documents on the basis of public interest.

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<sup>87</sup> Rossi, L., & e Silva, P.V. (2017). The Normative Development of Access to Documents. In *Public Access to Documents in the EU* (pp. 1–41). Oxford: Hart Publishing. p 9-10

<sup>88</sup> C-58/94 *Netherlands v Council*, EU:C:1996:171, §23. The argument was rejected by the CJEU, which considered that the Code of Conduct was "an act which is the expression of purely voluntary coordination and is therefore not intended in itself to have legal effects" (§27)

<sup>89</sup> Available at

<https://www.ombudsman.europa.eu/en/activities/speech.faces/en/292/html.bookmark;jsessionid=691A5F50EF18EDB097524F3067E0C27F> (accessed 09.05.2018)

<sup>90</sup> T-174/95 *Svenska Journalistförbundet v Council*, EU:T:1998:127

The right of access to documents was finally given a legally binding basis with the adoption of the Treaty of Amsterdam on 2 October 1997, where the insertion of the new Article 255 of the Treaty on European Communities (TEC) provided for the right of access to documents by the Parliament, Council and Commission to any natural or legal person “residing or having their registered office in a Member State.”

It was on the basis of the new Article 255(3) TEC, reading

*“[e]ach institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents”*,

that the Council and the Parliament adopted Regulation 1049/2001 (Access Regulation) regarding public access to European Parliament, Council and Commission documents.<sup>91</sup> The Regulation was adopted to enhance the openness of the Union towards its citizens, following the development of the EU, especially regarding the enlargement of 1995, which included the legal traditions of the Nordic countries, such as Sweden and Finland, where the freedom of information is seen as an integral part of fostering, among other things, transparency and freedom of expression.<sup>92</sup>

The introduction of the Charter introduced the right of access to documents as both as for its own, individual rights, protected under Article 42, reading

*“Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium”*,

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<sup>91</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (2001) OJ L 145/43.

<sup>92</sup> Hofmann, Rowe, Türk. Information and Administration. In Administrative Law and Policy of the European Union. (n.79) p.469

as well as a part of the right to good administration under Article 41. The Lisbon Treaty gave the Charter legally binding force, as discussed previously in this Chapter, and further moved the right to access from what was Article 255 TEC to Article 15 TFEU.

There has been discussion for the renewal of the Access Regulation, to the extent that in April 2008 the Commission had submitted a proposal for a Regulation that would replace the 2001 Regulation, especially in the light of the adoption of the Treaty of Lisbon, and the new Article 15(3) TFEU.<sup>93</sup> The discussions however stalled with the disagreements between especially the Council and the Commission, the Council blocking the proposal as for now.<sup>94</sup>

## 2.4.2 Regulation (EC) 1049/2001

The Access Regulation on access to documents of the Parliament, Council and Commission was adopted by the European Parliament and the Council on 30 May 2001, only approximately five months after the adoption of the Personal Data Regulation, on the basis of Article 255 TEC. Article 255(1) TEC (now Article 15 TFEU) grants any citizen and resident of the Union the right to access documents by the Parliament, Commission and Council. The second paragraph of that article, reading

*“General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.”*

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<sup>93</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL regarding public access to European Parliament, Council and Commission documents, COM(2008) 229 final 2008/0090 (COD)

<sup>94</sup> <http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-revision-of-the-access-to-documents-regulation> (accessed 22.05.2018)

was mentioned as a basis for the adoption of the Regulation.<sup>95</sup> The Regulation was adopted, as pointed out in Recital 1, to foster “an ever closer union among the peoples of Europe”, and to introduce greater transparency in the work of the Union.<sup>96</sup> It is argued that the entry of the Nordic countries, especially Sweden and Finland, to the EU in 1995 increased the pressure on the creation for greater transparency within the Union.<sup>97</sup> When starting to prepare for the adoption of the what would become the Access Regulation, the Commission took inspiration and studied the legislation of several countries, both those that were already Member States, such as Denmark, France and Greece, as well as non-Member States, such as Norway and Sweden.<sup>98</sup>

The Regulation is meant to offer ‘widest possible access to documents’ of the Parliament, Commission and Council, although almost of the EU institutions, bodies and agencies have now incorporated the rules on access to documents in their internal rules, with the exception of the CJEU, the European Central Bank, the European Investment Bank and Eurojust, which have modified the rules on access.<sup>99</sup>

### **2.4.2.1 Substantive Rules**

Article 1 of the Access Regulation sets out the aims of that Regulation as follows:

*“(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to [...] documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents, (b) to establish rules ensuring the easiest possible exercise of this right, and (c) to promote good administrative practice on access to documents.”*

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<sup>95</sup> Recital 4 of the Regulation 1049/2001

<sup>96</sup> Recital 3 of the Regulation 1049/2001

<sup>97</sup> Harden, I. (2009). ‘The Revision of Regulation 1049/2001 on Public Access to Documents’. *European Public Law* 15, no. 2. p. 239.

<sup>98</sup> Commission Communication on public access to the institutions’ documents (COM(93) 193 final)

<sup>99</sup> Kranenborg, H. (2006). Is It Time to Revise the European Regulation on Public Access to Documents [article]. *European Public Law*, (2), p.253



It grants that right, pursuant to Article 255 TEC, to any citizen or resident of the Union, to the documents of the institutions subject to the conditions of the Regulation. ‘Documents’ are defined as “any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility”. The definition of document is thus broad, and covers, among other things, also documents relating to competition law or the common foreign and security policy.<sup>100</sup>

The Union institutions are not, however, obliged to disclose all of the documents they have. Article 4 of the Regulation sets down exceptions for the ‘widest possible access’ principle governing, in general, the right of access to documents. If the document in question is only partially covered by the exception, the remaining parts must still be released.<sup>101</sup> Article provides for two different types of exceptions: those, where the institutions “shall refuse” the access, and those where the institutions need to balance the right of access to the interest in denying access to find whether the exception is applicable.<sup>102</sup>

The situations where the institution in question “shall refuse” access are covered by Article 4(1) of the Access Regulation, and include both documents which disclosure would undermine either the protection of public interest as defined by a list of that Article, or “the privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data”.<sup>103</sup>

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<sup>100</sup> Heliskoski, J., & Leino, P. (2006). DARKNESS AT THE BREAK OF NOON: THE CASE LAW ON REGULATION NO. 1049/2001 ON ACCESS TO DOCUMENTS. *Common Market Law Review*, 43(3), p. 743

<sup>101</sup> Harden. ‘The Revision of Regulation 1049/2001 on Public Access to Documents’ (n.97). p.240. Further, the CJEU has ruled, for example in the case C-28/08 *Bavarian Lager v Commission*, EU:C:2010:378, that the Commission had fulfilled its obligations of disclosing information when it had granted the access to a document that was requested, blanking the names of individuals not consenting to the disclosure of their names.

<sup>102</sup> Heliskoski, Leino. DARKNESS AT THE BREAK OF NOON: THE CASE LAW ON REGULATION NO. 1049/2001 ON ACCESS TO DOCUMENTS. (n.100) p. 744

<sup>103</sup> In the proposal drafted by the Council for an amending Regulation, this reference is erased, and instead reads “public interest as regards: (a) public security including the safety of natural or legal persons, (b) defence and military matters, (c) international relations [...]” and so forth. It would

The Regulation further provides for the form of the applications, including in Article 6(1) that the applicant is not obliged to state reasons for the application, as well as their processing of those applications and the manner of access after a confirmatory decision.

Article 6(1) and the fact that the applicants do not have to state reasons for their requests will be further discussed in the following Chapters.

## **2.5 Conflicts of Fundamental Rights**

Before moving to discuss the potential conflicts between the two Regulations mentioned before, it is important to discuss the conflicts between fundamental rights in a more general manner in order to understand what the issues are.

It appears that, at least on surface, the rights discussed above have conflicting end-goals, with the right to data protection protecting the data subject's right to determine the use of his or her own personal data,<sup>104</sup> while the right of access to information and documents promotes transparency. While this thesis will focus on the specific conflicts between the two Regulations governing these rights in regard to the Union institutions, it is important to first discuss the definition of a conflict of fundamental rights in order to understand what the potential conflicts between the instruments are.

### **2.5.1 Defining a 'Conflict of Fundamental Rights'**

There exist a number of definitions in the academic literature for the conflict of rights. Stijn Smet writes that

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also add a wider exception to the disclosure of personal data of public office holders, civil servants and interest representatives acting within their professional capacity.

<sup>104</sup> These rights are strengthened by the changes brought by the GDPR, and the subsequent obligation to read the Regulation 45/2001 in the light of the new rules.

*“[a] genuine conflict between human rights arises when the state is under incompatible duties to protect/respect the concrete human rights of two or more identified or identifiable individuals and/or entities, provided that these human rights are actually and sufficiently at stake”*<sup>105</sup>

suggesting that there are three elements necessary for the identification of a real conflict between human rights. First, there must be concrete rights at stake. Second, these rights are those of identified or identifiable individuals of entities. Third, these rights must be “actually and sufficiently at stake”.

Lorenzo Zucca defines a conflict of fundamental rights, as including two elements:

*“a choice between two separate goods (or evils) protected by fundamental rights; a fundamental loss of a good protected by a fundamental right no matter what the decision involves”*.<sup>106</sup>

His definition, while not as detailed as Smet’s, also focuses on the fact that there exist two rights which, if applied to their fullest extent, would exclude the application to the other either fully, or at least to a considerable extent. In cases such as these, there is no possibility to solve the issue between the rights without limiting either one or both of them.

Zucca has further made a distinction between “spurious or genuine” conflicts.<sup>107</sup> Spurious conflicts are the conflicts that on the surface might look like conflicts between two or more fundamental rights, but are actually a consequence of, for example, scarce resources or new developments, such as new technological developments being automatically seen as breaching the right to privacy.<sup>108</sup>

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<sup>105</sup> Smet, S. (2017). *Resolving conflicts between human rights: The judges dilemma*. London: Routledge Taylor & Francis Group. p.61

<sup>106</sup> Zucca, L. (2008) *Conflicts of Fundamental Rights as Constitutional Dilemmas*, in Brems (Ed.), *Conflicts Between Fundamental Rights*, p. 20.

<sup>107</sup> *Ibid*, p. 25.

<sup>108</sup> *Ibid*, p. 26.

Genuine conflicts, on the other hand, exist outside of the effect of such external elements.

An example of a case regarding a genuine conflict of rights is the *Evans v The United Kingdom*<sup>109</sup> from ECtHR. In that case, the applicant had undertaken IVF treatment with her then-boyfriend following the discovery of pre-cancerous tumours in both of her ovaries. Both she and her boyfriend signed a form consenting to the treatment and were informed that, before the embryos were implanted, they could at any time withdraw their consent. Following the breaking up of their relationship, the boyfriend withdrew his consent and requested the stock of embryos to be destroyed. The applicant challenged this, first in national courts, and then in the ECtHR, claiming a violation of her rights to private and family life under Article 8 ECHR in conjunction with the prohibition of discrimination under Article 14 ECHR, and the embryo's right to life under Article 2 ECHR. The ECtHR dismissed these claims.

For the purposes of the definition of the conflict of fundamental rights, this case gives a clear-cut conflict. The ECtHR noted that the right to private life “incorporates the right to respect for both the decisions to become and not to become a parent”.<sup>110</sup> Thus, there existed the conflicting rights, on the other hand, of Ms Evans to become a genetic parent to a child, and on the other, her ex-boyfriend's right to not become a parent.

In this case, these two rights cannot be exercised to their fullest extent, as the exercise of the other necessarily leads to the non-exercise of the other. Either Ms Evans will get her child, and her ex-boyfriend will become a (at least genetic) father, thus interfering with the ex-boyfriend's right to private life while fulfilling Ms Evans' right, or Ms Evans will not have a child, thus respecting her ex-boyfriend's right to not become parent under Article 8 ECHR, but also denying Ms Evans the right of becoming a parent, which restricts her right under Article 8 ECHR.

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<sup>109</sup> Case of *Evans v The United Kingdom* (Application no. 6339/05)

<sup>110</sup> *Ibid* §57

As the list of fundamental rights has grown from the traditional, first generation rights such as the right to life and freedom from torture, to include more modern rights, such as the right to protection of personal data, the potential for conflicts has increased as well.<sup>111</sup> A similar development is caused by the interpretation of the rights by the relevant Courts, as they either restrict or broaden the scope of the right.<sup>112</sup>

## 2.5.2 Conflicts of Fundamental Rights in the Court of Justice

In the post-*Stauder* case law the CJEU started slowly<sup>113</sup> addressing the conflicts arising in regard to the fundamental rights, mainly in two types of situations:

1. The situations where a fundamental right protected earlier by the general principles of the Union law, and later also by the Charter, conflicts with a fundamental freedom protected by a Treaty provision,<sup>114</sup>
2. The situations where two or more fundamental rights conflict with each other.

For the purposes of this thesis, I will focus on the latter type of conflicts in the case law of the CJEU, as they bear more relevance to the topic at hand. The Charter provides for a number of rights, some of which appear to be in conflict with each

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<sup>111</sup> Birbosia, E. and Rorive, I. 'In search of a balance between the right to equality and other fundamental rights', (2010) European Union Commission Thematic Report, p. 14

<sup>112</sup> For example, in the C-36/02 *Omega* (EU:C:2004:614) case the German court considered that the game of laser tag violated the fundamental right to dignity because it promoted of the playing of a 'killing game' even though the players participated in the game voluntarily. On the other hand, in the United States, the First Amendment rights have a wide scope, thus even protecting hateful or inflammatory racist speech, such as in the case *Bradenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>113</sup> The CJEU has been criticised of its slowness or reluctance of addressing the fundamental rights seriously and protecting them properly. See, for example, Rosas, A. (2014). Balancing fundamental rights in EU law. *Cambridge Yearbook Of European Legal Studies*, 16. p.348

<sup>114</sup> That is, with one of the four fundamental freedoms enshrined in the Treaties as being the cornerstones of the internal market of the EU: free movement of goods, free movement of persons, free movement of capital, and freedom to establish and provide services.

other more often than not. For example, the right to privacy under Article 7 of the Charter and the right to data protection under Article 8 of the Charter appear, as discussed above, to protect differing, or even conflicting interests when compared to the rights of, for example, the access to documents under Article 42 of the Charter, and the freedom of expression and information under Article 11 of the Charter.

The CJEU has often observed that many of the rights protected under the Charter are not absolute, which allows them to be balanced against each other in the search of a fair balance between the rights, and sometimes also interests, of the parties of the case. Unlike the Treaties, the Charter gives a set of guidelines for the purposes of interpreting how the rights contained in it can be restricted. Article 52(1) of the Charter reads:

*“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”*

The CJEU first applied Article 52(1) of the Charter explicitly in the *Volker* case,<sup>115</sup> where it discussed the ‘provided for by law’ and ‘objective of general interest recognised by the EU’ criteria of that Article,<sup>116</sup> and as those two criteria were met, the CJEU moved on to apply the principle of proportionality, that is, whether the restriction is suitable and necessary.

### **2.5.2.1 The Proportionality Test**

As the CJEU mentions in the *Volker* case, the principle of proportionality, one of the general principles of EU law, requires that any limitation of the fundamental rights must be “appropriate for attaining the objective pursued and [it does] not go

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<sup>115</sup> C-92/09 *Volker und Markus Schecke* (n.74). The first mention by the Court of Justice is in the case C-407/08 P *Knauf Gips v Commission* EU:C:2010:389 in §91, but the Court merely mentions the requirement of the limitation being provided for by law before moving on.

<sup>116</sup> C-92/09 *Volker und Markus Schecke* (n.74) §66-71

beyond what is necessary to achieve it".<sup>117</sup> In the sphere of primary law, the principle of proportionality is enshrined in both Article 52 of the Charter, as well as in Article 5(4) TEU,<sup>118</sup> and the Protocol (No 2) to the Treaty of Lisbon.

It is argued that the form of the proportionality test used by the CJEU is borrowed from the German law, potentially as a result of concerns of the German legal circles that EU law failed to respect this principle that has fundamental importance in the German law.<sup>119</sup> The German model included three tests that must be applied to the case at hand:

1. The measure in question must be suitable for achieving the objective for which it was adopted;
2. The measure in question must be necessary to achieve the objective, that is, there is no other, less restrictive measure available that could be used to achieve the objective;
3. The measure in question must be proportionate with regard to the objective it is meant to achieve (it must be proportional in the strict or narrower sense).<sup>120</sup>

This appears to indeed be the model of the test used by the CJEU when approaching the proportionality test, which it applies in principle both in regard to measures and actions of the EU institutions and bodies and when assessing the derogations to the four fundamental freedoms created by the Member States.<sup>121</sup>

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<sup>117</sup> *Ibid*, §74

<sup>118</sup> The direct mention of the principle of proportionality was added in the Treaty of Lisbon. The previous Article 5 TEC read "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty", hinting at the principle of proportionality, but mentioning only the necessity test.

<sup>119</sup> Jacobs, F.G. (1999). Recent Developments in the Principle of Proportionality in European Community Law. In E. Ellis (Ed.). *The Principle of Proportionality in the Laws of Europe* (pp. 1–22). London: Hart Publishing. p.1

<sup>120</sup> Schwarze, J. (2006). *European administrative law*. London: Sweet and Maxwell 2006. p.687

<sup>121</sup> Petursson, G. T. (2014). *The proportionality principle as a tool for disintegration in EU law: of balancing and coherence in the light of the fundamental freedoms*. Lund: Lund University, Faculty of Law 2014 (Lund: Media-Tryck). p.131

The case *Internationale Handelsgesellschaft*<sup>122</sup> is often mentioned as the case where the principle of proportionality emerged and was granted the status of a general principle of Union law.<sup>123</sup> Indeed both the Advocate General Dutheillet de Lamothe<sup>124</sup> and the CJEU<sup>125</sup> use the tests for necessity and appropriateness when discussing the measures concerned by that case. Although it had been discussed both by the parties and by the Court itself to a certain extent, in the previous case law,<sup>126</sup> in the *Schröder* case the CJEU finally explicitly addressed the principle of proportionality as a general principle of EU law, stating that

*“The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By the virtue of that principle, measures [...] are lawful provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. [...] the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued.”*<sup>127</sup>

There exist (mainly) two variations of the proportionality test the CJEU uses. Although the first time the principle of proportionality was announced as one of the general principles of Union law the CJEU mentioned all three tests or steps derived from the German law test, it uses a shorter two-step approach including only the suitability and necessity criteria in the majority of its decisions on proportionality, as noted by the Advocate General Maduro in his Opinion of the *Ahokainen and Leppik* case.<sup>128</sup>

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<sup>122</sup> C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114

<sup>123</sup> See, for example Jacobs, F.G. (1999). Recent Developments in the Principle of Proportionality in European Community Law. In E. Ellis (Ed.). *The Principle of Proportionality in the Laws of Europe* (pp. 1–22). London: Hart Publishing. p.1;

<sup>124</sup> C-11/70 *Internationale Handelsgesellschaft*:EU:C:1970:100, Opinion of the Advocate General Dutheillet de Lamothe p.1147 and 1153

<sup>125</sup> C-11/70 *Internationale Handelsgesellschaft* (n.4) §12

<sup>126</sup> The CJEU had discussed proportionality, albeit not as a general principle, in for example C-114/76 *Bergmann* EU:C:1977:116 §5; and in C-122/78 *Buitoni* EU:C:1979:43, §16

<sup>127</sup> C-265/87 *Schröder HS Kraftfutter* EU:C:1989:303, §21

<sup>128</sup> C-434/04 *Ahokainen and Leppik*, EU:C:2006:462, Opinion of the Advocate General Maduro, §26.



Thus, for example in the *Sky Österreich* case, the CJEU did not address the *stricto sensu* proportionality and rather stated that the

*“measures adopted by European Union institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”*<sup>129</sup>

It should also be noted that before the judgement in *Volker*, the CJEU had limited itself to the so-called “manifestly inappropriate test” when reviewing EU measures, which gives a wider discretion to the Union legislators.<sup>130</sup> Instead of engaging in a full proportionality test, the CJEU merely inspected on whether the measure was manifestly inappropriate, keeping in mind the discretion of the Union institutions.<sup>131</sup>

### **2.5.2.1.1 Proportionality in the Case-Law of the Court of Justice**

Before addressing the official three steps or tests included in the proportionality test by the CJEU, it should be noted that there exists first the question of whether the aim of the restriction in question is legitimate. Article 52(1) of the Charter sets the conditions in regard to limitations on fundamental rights to include that the limitation is provided for by the law and respects the essence of the right or rights that are being limited, and that the aim is an “objective of general interest recognised by the Union or the need to protect the rights and freedoms or others”.

The CJEU has held that the “provided for by law” criterion is fulfilled when the obligation that creates such limitation on fundamental rights is provided for by EU

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<sup>129</sup> C-283/11 *Sky Österreich* :EU:C:2013:28, §50

<sup>130</sup> Lind, A.-S., & Strand, M. (2011). A New Proportionality Test for Fundamental Rights? : The Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR* (C-92/09) and *Hartmut Eifert* (C-93/09) v. Land Hessen. Stockholm: SIEPS. p.4

<sup>131</sup> Tridimas, T. (1999). *The general principles of EC law. [Elektronisk resurs]*. Oxford ; New York : Oxford University Press, 1999. p.95. For a further example, see C-331/88 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others* EU:C:1990:391, §§15-16

legislative instrument as long as that basis defines the scope of the limitation.<sup>132</sup> The “general interest” criterion is, in principle, not generally defined, but includes interests such as fighting against terrorism<sup>133</sup> and increasing transparency of the use of funds.<sup>134</sup>

Usually, the first step to appear in the proportionality test, the suitability tests asks, in essence, whether the measure is suitable or appropriate to achieve the legitimate aim pursued by whatever limitation is in question. The test presupposes a causal link between the measure and the objective it pursues,<sup>135</sup> that is, the measure must lead to the achievement to the objective. This was also stated by the CJEU in, for example, the *Viking Line* case.<sup>136</sup>

The second step concerns the necessity of the measure in question. It asks whether the measure is necessary to achieve the aim, that is, whether there are less restrictive means that could have been used instead of the limitation in question. For example, in the *Satamedia* case the CJEU noted that the “limitations in relation to the protection of data [...] must apply only in so far as is strictly necessary”.<sup>137</sup>

These two steps are also codified in Article 52(1) of the Charter, which states that the fundamental rights can be limited only “if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”.

The CJEU rarely discusses the third step, which is the proportionality in the strict sense. It is less of a formal test, unlike the first two steps, and focuses on balancing the two conflicting rights or aims, aiming to find whether the measure is out of proportion compared to the intended objective, or whether one right is given a

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<sup>132</sup> See, for example, *Avis 1/15 Accord PNR UE-Canada* EU:C:2016:656 §139

<sup>133</sup> *C-293/12 Digital Rights Ireland* (n.45), §§41-42

<sup>134</sup> *C-92/09 Volker und Markus Schecke* (n.74), §71

<sup>135</sup> Petursson. *The proportionality principle as a tool for disintegration in EU law: of balancing and coherence in the light of the fundamental freedoms* (n.121) p.148, and the references therein.

<sup>136</sup> *C-438/05 The International Transport Workers' Federation and The Finnish Seamen's Union*, EU:C:2007:772, §75

<sup>137</sup> *C-73/07 Satakunnan Markkinapörssi and Satamedia*, EU:C:2008:727, §56

disproportionate weight over another.<sup>138</sup> However, after the formal adoption of the Charter together with the Treaty of Lisbon, the CJEU has started to use the balancing of rights especially concerning conflicts regarding fundamental rights.<sup>139</sup> It has remarked in cases such as *Sky Österreich*<sup>140</sup> and *Egenberger*<sup>141</sup> on this obligation to “strike a fair balance” between the competing rights or interests, whether it is done by the CJEU or by the legislator when drafting the legal instruments.

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<sup>138</sup> Jans, J. H. (2000). Proportionality Revisited [article]. *Legal Issues Of Economic Integration*, (2), p.241

<sup>139</sup> Petursson. *The proportionality principle as a tool for disintegration in EU law: of balancing and coherence in the light of the fundamental freedoms*. (n.121) p.313

<sup>140</sup> C-283/11 *Sky Österreich* (n.129) §60

<sup>141</sup> C-414/16 *Egenberger* EU:C:2018:257, §52

# 3 The Conflicts Between Regulation (EC) 45/2001 and Regulation (EC) 1049/2001

Following from what is discussed above, it appears that the right to protection of personal data and the right to access to documents have seemingly two separate, and potentially conflicting, end-goals for the rights, the protection of personal data potentially having the effect of constraining the public domain, while the right to access to documents aiming to expand it.<sup>142</sup> This is especially so, as the Union legislator has clearly intended, according to the wording of the Article 1(a) of the Access Regulation, to ensure the ‘widest possible access to documents’ for any citizen and resident of the Union.

This chapter will focus on finding whether there is an actual conflict between the provisions of the Regulations, and if so, to what extent are the provisions incompatible with each other.

It is interesting to note, as the Advocate General Sharpston did in her Opinion regarding the *Bavarian Lager* case,<sup>143</sup> that it was not likely that the legislator was unaware of the provisions of the Personal Data Regulation, when adopting the Access Regulation on 20 May 2001, merely six months after the adoption of the Personal Data Regulation on 18 December 2000. Therefore, the wording of the Articles discussed below are especially interesting, as are they appear to lead to two different directions.

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<sup>142</sup> Lynskey. *The foundations of EU data protection law* (n.63) p.136. See also, for example, T-115/13 *Dennekamp v Parliament* EU:T:2015:497 §40

<sup>143</sup> C-28/08 P *Commission v The Bavarian Lager* EU:C:2009:624, Opinion of Advocate General Sharpston, §93

There are three main conflicts that can be found from the main bodies of the Regulations. First, and perhaps most strikingly, there appears to be a clear contradiction between Article 8 of the Personal Data Regulation and Article 6(1) of the Access Regulation. Article 8 of the Personal Data Regulation requires that personal data can be transferred to recipients other than EU institutions and bodies where that recipient ‘establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of a public authority’ or that there is a necessity for the transferring of the data and it does not prejudice the legitimate interests of the data subject. Article 6(1) of the Access Regulation, however, states that ‘the applicant is not obliged to state reasons for the application’ to the access to a document.

Second, the wording of Article 6(1) of the Access Regulation appears to be in conflict with the principle of ‘purpose limitation’, as noted by Lynskey.<sup>144</sup> The principle of purpose limitation is codified in, for example, Article 4(1)(b) of the Personal Data Regulation, as well as Article 5(1)(b) of the GDPR, and states that the data shall be ‘collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes’. Since, following Article 6(1) of the Access Regulation, the recipient of the personal data is not obliged to state reasons for the request for the information, it appears impossible for the Union institutions and bodies to ensure that the personal data are not processed further than necessary or in a manner that is not incompatible with the purpose for which the data were collected.

Third, there has also been a discussion on whether transferring documents including personal data on the basis of the request under Article 6(1) of the Access Regulation fulfils the requirements of Article 5 of the Personal Data Regulation regarding the lawfulness of the processing.<sup>145</sup> This will, however, not be discussed, as on the basis of the CJEU’s case law it can be argued that this does not constitute an issue by

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<sup>144</sup> Lynskey. *The foundations of EU data protection law* (n.63), p.136

<sup>145</sup> Lynskey. *The foundations of EU data protection law* (n.63), p.137

itself, as the basis for the lawfulness of the disclosure can be found in the obligations provided for in the Access Regulation.<sup>146</sup>

### **3.1 The Conflict Between Article 8 of Regulation 45/2001 and Article 6(1) of Regulation 1049/2001**

#### **3.1.1 The Text of the Articles**

Article 8 of the Personal Data Regulation concerns the transfer of personal data by the Union institutions and bodies to recipients who are subject to the Data Protection Directive. It reads as follows:

*“Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC,*

*(a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or*

*(b) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.”*

It appears to set a clear rule on the situations where the Union institutions and bodies may transfer personal data to third parties. The common criteria for both subparagraphs a) and b) is that it is for the recipient to establish that the transfer of the data is necessary, either because of the recipient's obligations which are in the public interest, or if it is necessary to have the data and the transfer will likely not threaten the legitimate interests of the data subject.

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<sup>146</sup> See, for example, C-291/12 *Schwarz* (n.76), §35, where the limitations were provided for by law as they were provided for by a provision of a Regulation.

This appears to be further clarified by Article 4(1)(b) of the Access Regulation, which sets out exceptions to the standard of ‘widest possible’ access, and reads:

*“1. The institutions shall refuse access to a document where disclosure would undermine the protection of: [...]*

*(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.”*

This is echoed in Recital 11 of that Regulation, which states that the “institutions should take account of the principles in [Union] legislation concerning the protection of personal data, in all areas of Union activities.”. The intent of the legislator is, therefore, appearing to have been to ensure respect for the right to privacy of the individuals whose personal data were processed by the Union institutions and bodies also in the context of facilitating the access to documents of those bodies and institutions.

Keeping this in mind, it is interesting to note the wording of Article 6(1) of the Access Regulation, which explicitly states that “[t]he applicant is not obliged to state reasons for the application.”

### **3.1.2 The Conflict Between the Articles**

The conflict between Article 8 of the Personal Data Regulation and Article 6(1) of the Access Regulation appears to be clear cut. On the other hand, the rules on data protection require the recipient of documents including personal data to establish that such transfer of data is necessary, and either required for a performance of a task in public interest or subject to exercise of public authority, or the transfer does not prejudice the legitimate interests of the data subject. On the other hand, the rules on access to documents clearly state that the recipient of such documents is not obliged to state reasons on why they want access to said documents. While this might not appear problematic when considering the broader scope of all of the

documents the Regulation applies to, it causes problems with those documents including personal data.

However, Article 4(1)(b) mentioned above brings an additional element to the interpretation of this conflict. It appears, as noted above, that the intent of the legislator was not to prevent the access to documents containing personal data of individuals as a whole but merely to those documents that would prejudice the privacy and integrity of that individual.

Textually, there appears to be a clear conflict between the two provisions. The Union institutions and bodies are under an obligation, under Article 8 of the Personal Data Regulation, to ensure that the transfer of the personal data is necessary and does not prejudice the interests of the data subject. On the other hand, they are under the obligation to provide ‘widest possible access’ to the documents of these institutions and bodies to all residents of the Union, who are not obliged to state the reasons for why they are requesting such access in the first place. It thus appears, on the face of it, to be impossible to fulfil both of these obligations simultaneously, as if the request for documents does not contain a reason for the request, there is no way to ascertain that the transfer of personal data occurring when the documents are disclosed to the person requesting them is necessary.

### **3.1.2.1 The *Bavarian Lager* Case**

These Articles came under discussion in the *Bavarian Lager* case,<sup>147</sup> which concerned a complaint sent by the company which had partially been denied access to minutes of the meeting between Commission officials, UK government officials, and additionally industry representatives regarding an alleged Treaty infringement. The applicant in the Court of First Instance (CFI) case lodged an application under the Access Regulation to access the full documents, including the names of the persons present in the meeting. The Commission partially complied, releasing the

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<sup>147</sup> Both in the General Court as the case T-194/04 *Bavarian Lager v Commission* (n.69), and in the Court of Justice as the case C-28/08 P *Commission v Bavarian Lager* (n.101)



documents with the exception of the names of those individuals who had not consented to the release.<sup>148</sup>

The Commission relied on Article 4(1)(b) of the Access Regulation as an exception to its obligation to provide access and stated that the applicant had failed to prove that there was an actual need for the disclosure of the names as it should have done under Article 8 of the Personal Data Regulation. The CFI noted in its findings, addressing the argument of the Commission, that following Article 6(1) of the Access Regulation a person requesting access is not required to justify the request.<sup>149</sup>

When the case reached the CJEU on the appeal by the Commission,<sup>150</sup> that Court started by stating, rather unhelpfully, that since neither of the Regulations is explicitly given primacy over the other, both of them should be applied in full.<sup>151</sup> The CJEU disagreed with the General Court in regard to the role the data protection legislation has in situations where access to documents which include personal data has. Where the General Court had held that the Personal Data Regulation sets out ‘additional conditions’, such as the demonstrating the necessity of the transfer, those conditions would be contrary to the objective of the Access Regulation,<sup>152</sup> the CJEU held that the disclosure should be in conformity with EU data protection law, and the rules of the Personal Data Regulation apply “in their entirety, including Articles 8 and 18”.<sup>153</sup>

The Advocate General Sharpston gave a different Opinion of the case, which surprisingly was not referred by the CJEU once. She argued that the communication

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<sup>148</sup> Five names in total were blanked out from the minutes of the meeting, two following the refusals of the persons in question to consent to the disclosure, and three because of the Commission’s failure to contact them; T-194/04 *Bavarian Lager v Commission* (n.69) §35

<sup>149</sup> This has been held consistently by the Court of First Instance, even before the adoption of the Regulation 1049/2001. See, for example, case T-124/96 *Interpoc v Commission* EU:T:1998:25 §48 and case T-92/98 *Interpoc v Commission (Interpoc II)* EU:T:1999:308 §44 with regards to access to documents under the Decision 94/90

<sup>150</sup> C-28/08 P *Commission v Bavarian Lager* (n.101)

<sup>151</sup> *Ibid*, §56. See also Lynskey, O. (2011). Data Protection and Freedom of Information; Reconciling the Irreconcilable. *The Cambridge Law Journal*, (1), p.38

<sup>152</sup> T-194/04 *Bavarian Lager v Commission* (n.69) §107

<sup>153</sup> C-28/08 P *Commission v Bavarian Lager* (n.101) §63

of the data in question did not fall within the scope of the Personal Data Regulation, as it did not constitute “processing of personal data wholly or partially by automatic means”.<sup>154</sup> She based this claim on her division of different types of documents. The ‘b-1’ category, which included the documents in the case, contains an ‘incidental mention’ of personal data, as in the original purpose of the document was not compiling personal data.<sup>155</sup> The second, ‘b-2’ category contains documents with a large quantity of personal data, and those documents were compiled precisely for the purpose of gathering together that data.<sup>156</sup> Following this, she argued, the Commission should have evaluated the request in light of the privacy exception in Article 4(1)(b) and Article 8 ECHR.<sup>157</sup>

Following these different interpretations, there indeed appears to be at least confusion regarding the relationship between these provisions. The CJEU held that the Commission had sufficiently fulfilled its duty of openness, and its obligations under the Personal Data Regulation, as it was not able to verify whether the interests of those data subjects who had not consented to the disclosure of their names would be prejudiced since the applicant did not establish the reason why it required the personal data.<sup>158</sup> The Court did not, however, address the conflict to its full extent, perhaps due to the fact that once it had established the necessity requirement, there was no need to consider the rest of the remaining conflict in order to resolve the case.

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<sup>154</sup> C-28/08 P *Commission v Bavarian Lager*, Opinion of the Advocate General Sharpston, (n.143), §190

<sup>155</sup> *Ibid*, §159

<sup>156</sup> *Ibid*, §159

<sup>157</sup> *Ibid*, §191-192

<sup>158</sup> C-28/08 P *Commission v Bavarian Lager* (n.101) §§76-79

## 3.2 The Conflict Between the Principle of Purpose Limitation and Article 6(1) of Regulation 1049/2001

### 3.2.1 The Principle of Purpose Limitation

The principle of purpose limitation, codified in Article 6(1)(b) of the Data Protection Directive<sup>159</sup> and in Article 4(1)(b) of the Personal Data Regulation, requires that personal data is “collected for specified, explicit and legitimate purposes, and not further processed in a way incompatible with those purposes.” It gives expression to the fundamental right to privacy, set out in both Article 7 of the Charter, and Article 8 ECHR, and safeguards, at least to an extent, the individuals’ right to self-determination in regard to the personal data they have shared.<sup>160</sup>

According to Advocate General Kokott in her Opinion in the *Promusicae*,<sup>161</sup> the principle of purpose limitation is an expression, particular to the field of data protection law, of the requirement of foreseeability. It grants the data subjects the, at least theoretical, understanding of how the personal data they disclose is going to be processed, and for what purposes.

According to the EU’s Article 29 Working Party (Art 29 WP), an advisory body set up with Article 29 of the Data Protection Directive,<sup>162</sup> the purposes of data collection must be specified the latest at the time of the collection of the personal data, and the purpose must be identified in a manner that is clear enough for the data subject to understand what kind of processing will or will not be included.<sup>163</sup>

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<sup>159</sup> From 25 May 2018 the relevant provision with regards to the Member States will be the Article 5(1)(b) of the GDPR

<sup>160</sup> Rauhofer, J. (2015). Of Men and Mice: Should the EU Data Protection Authorities' Reaction to Google's New Privacy Policy Raise Concern for the Future of the Purpose Limitation Principle [article]. *European Data Protection Law Review (EDPL)*, p.8

<sup>161</sup> C-275/06 *Promusicae* EU:C:2007:454, Opinion of Advocate General Kokott, §53

<sup>162</sup> Replaced by the European Data Protection Board by the GDPR Article 68

<sup>163</sup> Article 29 Data Protection Working Party, Opinion 03/2013 on purpose limitation (2013); 00569/13/EN (WP 203), p.15

### 3.2.2 Conflict Between the Principle and Article 6(1) of Regulation 1049/2001

Keeping this in mind, it is the obligation of the controller, that is, in the scope of this thesis the Union institutions and bodies, to ensure the compliance with the principle of purpose limitation, that is, to ensure that the personal data they have collected are not processed in a manner that is incompatible with the purpose of the collection, following both the wording of Article 4(2) of the Personal Data Regulation, as well as the CJEU in, for example, the *Puškár* case.<sup>164</sup>

The issue here lies, again, with the fact that anyone requesting documents from the Union institutions or bodies is not obliged to state any reasons for that request under Article 6(1) of the Access Regulation; they do not have to give any indication of why they would like to access those documents, and simultaneously process the personal data contained therein. Lynskey gives an example of an unsuccessful candidate requesting the documents with information on the successful candidates for research funding. In her example, the original purpose for the collection of the personal data is to administer the funding effectively, whereas the purpose of the unsuccessful candidate for accessing those documents and processing the personal data therein is to assess whether the selection process was fair. She presents the question of whether this second purpose is compatible with the first.<sup>165</sup>

The question, therefore, is whether the fact that the Union institutions and bodies, being incapable of ascertaining that any further processing by the person requesting the documents including personal data are in breach of the data protection rules when providing documents including personal data in compliance with their

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<sup>164</sup> C-73/16 *Puškár* EU:C:2017:752, §110. Although this case concerned the Data Protection Directive, the wordings of Article 6(1)(b) of that Directive and Article 4(1)(b) of Regulation 45/2001 are nearly identical, and both instruments clearly state that the obligation to ensure the application of the principle of purpose limitation is on the controller of the personal data.

<sup>165</sup> Lynskey. *The foundations of EU data protection law*. (n.63) p.137

obligations under the Access Regulation. On a very strict reading of both the legislative instruments and the case-law, it appears to be so.

### 3.3 The Conflicts as Conflicts of Fundamental Rights

It could be argued that these conflicts are not necessarily conflicts only on the level of the administrative rules contained in the Regulations, but further between the fundamental rights these Regulations embody, that is, the right of access to documents, and the rights to data protection and, to some extent, privacy. Framed another way, there is a conflict, embodied in these conflicts of provisions, between the general principle of transparency or openness, and the fundamental rights of individuals to data protection and privacy.<sup>166</sup>

The conflicting rules appear to indeed be set on place to protect the fundamental rights, rather than to set out administrative rules. Article 8 of the Personal Data Regulation forces the Union institutions and bodies to consider both the necessity of the transfer, and the effect the disclosure of personal data have on the interests of the data subject. Those interests, following the case law of the CJEU, include the interests of the data subject both in regard to his or her right to data protection, that is, that the data is processed fairly and for specified purposes,<sup>167</sup> as well as the right to privacy.

The principle of purpose limitation, as also codified in Article 4(1)(b) of the Personal Data Regulation, is further a substantive part of the right to data protection under Article 8(2) of the Charter, which stipulates that “data must be processed [...] for specified purposes”.

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<sup>166</sup> This fulfils the definitions of conflicts of fundamental rights discussed in Chapter 2, as it is not possible to resolve the tension without limiting at least one of the rights.

<sup>167</sup> Article 8(2) of the Charter. For a discussion on whether the right to data protection includes only Article 8(1) of the Charter or all of the paragraphs, see Tzanou. *The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance*. (n.69) p.39-40

On the other hand, Article 6(1) of the Access Regulation, appears to be more of an administrative provision, rather than one embodying the right itself. However, it should be noted that the specific part conflicting with the other provisions is the applicant not being obliged to state reasons for their application, and not the form of the application itself. This means that the person does not need to demonstrate why they want access to the documents,<sup>168</sup> which gives the individuals the possibility to request access in the light of the public interest of the disclosure, rather than simply in their individual interest.<sup>169</sup> This ensures, in principle, the impartiality of right of access to documents, as the evaluation of the request is not done on the basis of the reasons of that request, but rather on the basis of the merits of the document.

Following these considerations, it does appear that the conflicts are caused by the fundamental rights the Regulation embody, as they have differing, and to an extent conflicting, end-goals. This must then be taken into consideration when assessing the potential solutions of the conflicts, as any limitation of a fundamental right must be in accordance with Article 52(1) of the Charter and the provisions contained therein.

The next chapter will focus on the approach of the CJEU regarding these conflicts, as well as suggestions on how to clarify several issues and ensure the furthest possible respect to both of these rights.

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<sup>168</sup> The specifics of this depend by institution. For example, while the applicant is not obliged to state reasons in the application, the Commission may ask further questions before granting access to the documents. See Moser, C. (2001). How open is 'open as possible'? Three different approaches to transparency and openness in regulating access to EU documents. *HIS Political Science Series*: 2001, No. 80. p.12 and 14

<sup>169</sup> Kranenborg. Is It Time to Revise the European Regulation on Public Access to Documents. (n.99) p.259

# 4 Analysis of the Approach of the Court of Justice to the Conflicts and Suggestions for Clarifications

The previous chapter established the two main conflicts between the provisions of the Regulations discussed, that is, between Article 6(1) of the Access Regulation and both Article 8 of the Personal Data Regulation and principle of purpose limitation codified in Article 4(1)(b) of that Regulation.

In this chapter the approach by the CJEU to these conflicts will be analysed, followed by assessment of the remaining issues and offering of several clarifications and suggestions regarding them.

## 4.1 Approach by the Court of Justice

The CJEU has given judgements concerning the conflicts discussed in the previous Chapter in two cases: *Bavarian Lager* and *ClientEarth*.

In the *Bavarian Lager* case, as discussed in the Chapter 3.1.2.1 above, the CJEU stated that the full application of both of the Regulations should be ensured. This judgement focused more on the only express link between those two Regulations, Article 4(1)(b) of the Access Regulation,<sup>170</sup> which in turn focuses on the privacy and integrity of an individual in the light of the EU rules on data protection, rather than the right of data protection per se. The CJEU held that by dismissing the application of Article 8 of the Personal Data Regulation, it dismissed an Article that

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<sup>170</sup> C-28/08 P *Commission v Bavarian Lager* (n.101) §57

constitutes an essential provision of the system of protection<sup>171</sup> that, according to Recitals 7 and 14 of that Regulation, should apply “in any context whatsoever”. It further held that by requiring Bavarian Lager to demonstrate the necessity for the disclosure of the names of the individuals who had not consented to the disclosure, the Commission fulfilled its obligations under the Personal Data Regulation, while still complying sufficiently with its duty of openness under the Access Regulation.<sup>172</sup>

In *ClientEarth* the CJEU held that where an application for access to documents including personal data within the meaning of the Personal Data Regulation, Article 8(b) in particular, along with the rest of the Regulation, become applicable in their entirety.<sup>173</sup> It then repeated the two-step test for the transfer of the personal data that was held by the General Court:

1. Whoever requests such a transfer must first establish that it is necessary
2. If the transfer is demonstrated to be necessary, the institution must determine that there is no reason to assume that the transfer would prejudice the legitimate interests of the data subject.<sup>174</sup>

Furthermore, the CJEU repeated its holding in the *Volker* case that the objective from transparency cannot be automatically given priority over the right to data protection.<sup>175</sup> In this case the CJEU held that the General Court had erred in determining that the applicants had not demonstrated the necessity of the transfer sufficiently and set aside that judgement.<sup>176</sup>

As regards to the principle of purpose limitation, the CJEU has stated in the context of Article 6(1)(b) of the Data Protection Directive that processing of personal data that was collected for one reason for another reason is not necessarily incompatible

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<sup>171</sup> *Ibid* §64

<sup>172</sup> *Ibid* §§76-77

<sup>173</sup> C-615/13 P *ClientEarth* (n.57) §44

<sup>174</sup> *Ibid* §47

<sup>175</sup> *Ibid* §51

<sup>176</sup> *Ibid* §59. The CJEU noted in §57 that there existed a study, known to the parties and to the General Court, linking majority of the experts whose personal data was included in the documents to industrial lobbies, therefore creating grounds for the necessity of the transfer of those documents to ensure impartiality of those experts.



with the original purpose, as long as the obligation causing the processing is necessary for legitimate purposes.<sup>177</sup>

It appears, on the light of these judgements, that the assumption is that as long as the further processing is due to legal obligations of the Union institution or body, it is for them to prove that the processing would be incompatible with the original reason for collecting the personal data. However, this does not answer the issue of further processing by the recipient of that personal data.

#### **4.1.1 Blanking out the Personal Data**

As the CJEU has consistently held, the Personal Data Regulation is applicable to the access to documents which contain personal data. This means that the granting of access must be evaluated in the light of the rules provided for by that Regulation, especially those in Article 8 concerning transfer to personal data to recipients other than Union institutions and bodies, in addition to the rules in the Access Regulation.

The first requirement of Article 8, in both paragraphs (a) and (b), is the demonstration of necessity of the transfer. On the face of it, this appears to conflict with Article 6(1) of the Access Regulation which explicitly states that the person requesting access to documents does not have to state reasons for such a request.

The necessity requirement does not, however, apply to the documents as a whole, but merely to the personal data contained in those documents. Following this, the Union institutions and bodies are, in general, obliged to disclose the documents in full *to the extent* that that disclosure does not include personal data. In majority of the cases, the Union institution or body had granted partial access to the documents containing personal data, simply blanking out names and other information that could be attached to an identifiable person, and following the judgements of the CJEU, thus fulfilling their obligations under both Regulations.

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<sup>177</sup> See, C-342/12 *Worten* EU:C:2013:355 §45

This appears to be a reasonable balance between, on the other hand, Article 6(1) of the Access Regulation, and the requirement of necessity of the transfer in Article 8 of the Personal Data Regulation, on the other. It gives the individuals requesting those documents the widest possible access to the documents, to the extent that that access does not conflict with the protection of personal data. Should the applicant request the personal data, it is for the Union institutions and bodies to ensure first the necessity of such transfer of personal data, in compliance with Article 8 of the Personal Data Regulation. This could be seen, in a manner, as taking the first step in ensuring the proportionality of the limitation of the right to protection of the personal data, and also potentially the privacy, of the data subject.

Thus, the stand of the CJEU to the conflict between the two interests appears to be that while in principle the Union institutions and bodies are obliged, under their duty of openness, to provide access for their documents on widest possible basis, that obligation does not concern the personal data contained within the documents. The Union institutions and bodies are thus free to blank out the personal data of the data subjects from the documents unless the person requesting those documents can prove that the data are necessary, and the institution or body in question has no reason to assume that the transfer would prejudice the legitimate interests of the data subject.

#### **4.1.2 Balancing the Interests of the Parties**

The next step, as stated by the CJEU, is to ensure that the disclosure of the personal data, once deemed necessary for whichever legitimate purpose, does not appear to prejudice the interests of the data subject. This has not been expanded upon by the CJEU, but the General Court has stated in there is a connection between this condition, and the exceptions in Article 4 of the Access Regulation regarding the privacy and integrity of an individual.<sup>178</sup>

Following this, this criterion appears to be dealing more with the effect to the right to privacy of the data subject than the right to data protection as an individual right.

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<sup>178</sup> See, for example, T-115/13 *Dennekamp* (n.142) §§37-39

This might be, in part, due to the history of the right to data protection and its connection to the right to privacy, and the continuous use of those two rights when defining each other.<sup>179</sup>

It is notable that as both of these Regulations concern fundamental rights, neither of the rights can be outright ignored to the benefit of the other. The CJEU has repeatedly held, for example in cases such as *Schmidberger*,<sup>180</sup> *Promusicae*<sup>181</sup> and *Scarlet Extended*,<sup>182</sup> that where two fundamental rights or freedoms collide, they must be weighed against each other and a fair balance must be struck between the differing interests and fundamental rights taking into consideration the circumstances of the specific case.

While the CJEU has addressed this fact, especially in its case-law regarding the Data Protection Directive, it has not fully addressed the balancing of the interests, nor given clear guidance on how it should be done.

## 4.2 Suggested Clarifications to the Approach of the CJEU

In situations where the Union institutions are requested to grant access to documents including personal data, and regarding the first conflict discussed, the approach of the CJEU appears mostly reasonable, if slightly unclear regarding the second step.

The first step and the established necessity requirement are arguably reasonable, as the necessity of the disclosure of documents not including personal data does not have to be established as per the fact that the applicant does not need to state reasons for their request. Where the document includes personal data the Union institutions

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<sup>179</sup> For example in C-73/16 *Puskár* (n.164) §112

<sup>180</sup> C-112/00 *Schmidberger* EU:C:2003:333 §§80-81

<sup>181</sup> C-275/06 *Promusicae* (n.73) §70

<sup>182</sup> C-70/10 *Scarlet Extended* EU:C:2011:881 §§48-49

and bodies are complying with both their obligation to respect the rules on processing personal data and their duty to openness when they blank out the personal data in the documents, or otherwise give partial access to the documents, not including the personal data therein. Should the recipient of the documents require the personal data to be disclosed, they are then obliged to establish the necessity of that disclosure, as per the relevant data protection rules, to ensure that the personal data is not processed further than necessary.

After establishing the necessity of the transfer of personal data, the focus seems to shift to the privacy of the data subject, pursuant both to the judgements of the Courts, as well as the text of both Article 4(1)(b) of the Access Regulation, as well as Article 8(b) of the Personal Data Regulation. It could be argued that it is here that the Courts apply Article 4(1)(b) of the Access Regulation in regard to the privacy exception, although this is not mentioned by the Courts themselves. Instead they refer to the obligation under Article 8(b) to assess any potential prejudice to the legitimate interests of the data subjects.

To clarify this, it should be noted that most often the evaluation of the interests of the data subject would in practice be the evaluation of the interference or limitation to their right to private life, as protected by the data protection rules. For example, and as the EDPS argued in the General Court in the *Bavarian Lager* case,<sup>183</sup> the exceptions provided for by Article 4 of the Access Regulation are intended to protect the privacy and integrity of the persons mentioned in the documents, and not necessarily their personal data *per se*. However, as the CJEU held in the same case, the EDPS erred in that it considered that the data protection rules would not be applicable at all.

Furthermore, any assessment of the CJEU or the General Court should take into accordance Article 52(1) of the Charter, at least by context, if not directly. This is because the conflicting provisions concern, as discussed in Chapter 3.3, the substance of the rights the Regulations embody, and any manner of resolving

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<sup>183</sup> T-194/04 *Bavarian Lager* (n.69) §§65-68

requires them to be balanced against each other, and most likely will cause limitations to the rights themselves, such as when disclosing personal data in order to comply with the right of access. While not necessarily mentioning Article itself, it would appear that the legislator has taken the general requirements into consideration by requiring reason, on the other hand, for the institutions to limit the access to documents, and on the other hand, by requiring the necessity of the transfer of personal data and allowing it only where it does not prejudice the legitimate interests of the data subject, thus appearing to justify the limitations to both rights.

It might further clarify the situation should the CJEU adopt the reasoning of the Advocate General Sharpston in the *Bavarian Lager* case, at least as far as concerning the different type of documents containing personal data.<sup>184</sup> If the documents merely contain ‘incidental’ personal data, such as is usually the case with minutes of the meeting, the interference with the data subjects interests appear to be minimal, and there is no real and substantial effect to the right to private life on allowing the disclosure of such personal data, unless the context clearly indicates otherwise,<sup>185</sup> or the data subject objects to this under his or her rights of Article 18 of the Personal Data Regulation.

#### **4.2.1 Considerations Regarding the Overlap of the Right to Data Protection and the Right to Privacy**

There is, of course, the issue of defining ‘sensitive nature of personal data’. Should it be defined as sensitive data within the meaning of Article 10 of the Personal Data Regulation, which includes categories of personal data which may not be

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<sup>184</sup> C-28/08 P *Bavarian Lager*, Opinion of Advocate General Sharpston, (n.143) §§175-182

<sup>185</sup> This might be the case in, for example, minutes of a meeting concerning decision making process that is still sensitive, or where the opinions of the persons included are treated as confidential or might otherwise seriously damage the private life of that individual, and so forth. However, in cases such as this the relevant Union institution may also, under the Article 4 of the Regulation 1049/2001, deny access to the documents relying on one of the other exceptions.

processed,<sup>186</sup> unless that is allowed by a specific exception, or should the considerations focus more on the effects of the disclosure to the data subject, thus potentially including also things like names, where the context would so require?

This leads us back to the discussion of the connection between the rights to privacy and data protection, and whether they are two separate rights with the same end goal, two facets of the same right, or two separate, but sometimes overlapping rights. In Chapter 2.3.3 these were briefly discussed through the Models presented by Lynskey, and the conclusion that was reached is that these rights, in the scope of EU law, most resemble the last one.

The possible solution of the conflicts discussed appears to fit within the overlapping area of these two rights. It is, on the other hand, in the interests of the data subject, regarding solely the right to data protection, that his or her personal data is not processed further than necessary or without a legitimate purpose. On the other hand, with regard to the right to privacy, these rules aim to ensure that the personal data, containing information that could affect the private life of that data subject, are not disclosed unless necessary and proportionate to the aim of the disclosure.

It follows that the disclosure of Union documents including personal data to individuals who request them falls within the overlap of the interests represented by these two rights, and that it is therefore justifiable to consider both of these rights when resolving the conflicts.

Following this logic, and despite the fact that both textually and by their scope the right to privacy and the right to data protection are two separate, but overlapping, and in the case-law of the CJEU somewhat connected rights, the balancing of the right to data protection with the right to access seems to logically end in considerations of the privacy of the data subject. Thus ‘sensitive data’ should include all personal data that, if disclosed to third parties, could be reasonably

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<sup>186</sup> The Article 10 of the Regulation 45/2001 prohibits the processing of “personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life”

expected to negatively affect the private life of the data subject, taking into consideration both the context of the data, as well as the case as a whole.

As regards to the removal of the textual link to the right to privacy from the data protection instruments following the GDPR, and the potential of that having an effect on the considerations presented above, it should be remembered that the proposed version of the new Article 8<sup>187</sup> gives two criteria for the transmission of personal data after the establishment of the necessity:

1. It is proportionate to the purposes of the transmission
2. There is no reason to assume it prejudices the data subject's rights, freedoms or legitimate interests.

While the text itself does not refer to the right to privacy, considerations of that right should still be taken into account under the new criteria, with regard to both the rights of the data subject, as well as the proportionality test when considering the extent of personal information can be shared and the effect to the data subject it will have.

## **4.2.2 Addressing the Principle of Purpose Limitation**

The solution in regard to the principle of purpose limitation appears to be less clear. While the further processing by either the controller, or the appointer processor, appears to be assumed to not be incompatible with the original purpose unless otherwise proven, the compatibility becomes less clear when adding the recipient of the documents into the picture. For example, in its judgement in *Dennekamp*, the General Court rejected the Parliaments argument relating to Article 4(1)(b) of the Personal Data Regulation and the principle of purpose limitation, as the Parliament in that case had not shown any evidence that the processing would be incompatible with the purposes for which the data was originally collected for.<sup>188</sup>

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<sup>187</sup> Article 9 in the Proposal for the Regulation replacing Regulation 45/2001 by Commission

<sup>188</sup> T-115/13 *Dennekamp* (n.142), §90

Going back to the example given by Lynskey discussed in Chapter 4.2.2., it is clear that there are, and will always be, situations where the further processing of the personal data by the recipient of the documents has a different purpose than the original collection of that personal data. However, the fact that the purpose is different does not necessarily mean that the purposes are incompatible.

As discussed above, it is suggested that while for the disclosure of the documents by the Union institutions and bodies the applicant is not obliged to state the reason for the request, in order to access the personal data contained therein they have to prove the necessity for such disclosure. In theory, this should allow the relevant institution or body, the controller of the personal data, to fulfil their obligations under Article 4(1)(b) of the Personal Data Regulation to ensure that the further processing is not incompatible with the purposes of the collection.

However, this is not certain. The CJEU has not fully addressed the scope and limitations of the principle of purpose limitation, either due to its reluctance to address the issue, or because it simply has not been referred a question concerning it. Advocate General Kokott has stated, as mentioned earlier, that the principle of purpose limitation is an expression of the requirement of foreseeability.<sup>189</sup> This, in principle, means that the institutions, when allowing the disclosure of the personal data, should take into consideration that the purpose for which they allow the further processing is not incompatible, *in the eyes of the data subject*, with the purpose for which the data subject gave the personal data for in the first place.

As the definition of ‘incompatible purposes’ remains unclear, a possible suggestion would be that the purpose for further processing would be incompatible only where it is manifestly so or goes clearly against the original purpose. This would, however, drastically limit the protection offered by both the rules on data protection, as well as the right to privacy, and appears not ideal.

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<sup>189</sup> C-275/06 *Promusicae*, Opinion of the Advocate General Kokott (n.161) §53



Again, due to the changes brought by the GDPR, the future of this issue remains to be seen. The GDPR has taken a stronger stand on the principle of purpose limitation than the Data Protection Directive did, specifically mentioning it in Article 5(1)(b). It will be interesting to see how the Courts will address it, both regarding the GDPR itself, but also regarding the Personal Data Regulation, which has to be adapted to the rules of the GDPR, following both the Recital 17, as well as Article 2(3).

## 5 Conclusion

The beginning in Chapter 2 gives a general overview of both the fundamental rights in general, as well as the specific rights of data protection and access to documents, was given. The Chapter established the legal basis for both rights, as well as discussed the adoption and substantive provisions of each of the relevant Regulations. Further, conflicts of fundamental rights were discussed in a more general manner with a definition for the term ‘conflict of interest’, as well as a brief overview to the case-law of the CJEU in regard to its approach and the principle of proportionality.

Chapter 3 established the two main conflicts that are discussed. First, there exists a conflict between, on the other hand, Article 8 of the Personal Data Regulation, which requires that the person requesting transfer of personal data must prove the necessity of such transfer, as well as show that the transfer would not prejudice the legitimate interests of the data subject, and on the other hand, Article 6(1) of the Access Regulation which states that the applicant is not obliged to state reasons for any request of access to documents. There was also a brief consideration of the CJEU’s judgement in the *Bavarian Lager* case, in which it stated that the Regulations should both be applied to their fullest, creating more confusion.

Second, there appears a conflict between, on the other hand, the principle of purpose limitation which is codified in Article 4(1)(b) of the Personal Data Regulation, and again Article 6(1) of the Access Regulation. The principle of purpose limitation requires that any personal data are not further processed in a way that is incompatible with the purpose for which the data was collected for. This requires the controller to specify the purpose for the collection of the data in a manner that enables the data subject to understand the types of processing that will or will not be included. Looking at this obligation with the fact that the applicant is not obliged to state reasons for the request to access documents, and thus for further processing, makes the conflict clear.

In Chapter 4 the approach of the CJEU to these conflicts is studied. It appears to have set a reasonable test that works in practice in regard to the necessity requirement for transfer of personal data, that is, the Union institutions can either blank out the personal data before giving access to the documents, or if the personal data is requested, they can request that the applicant demonstrates the necessity of such transfer for legitimate interests.

The approaches of the Courts are less clear when it comes to giving guidance regarding the “legitimate interests of the data subject”. In fact, the CJEU has not addressed this specific criterion, and it is mentioned by the General Court only a handful of times. There appears to be a link between the interests of the data subjects and Article 4(1)(b) of the Access Regulation, which grants exceptions under which the institutions can deny access to documents regarding the privacy and integrity of the person concerned. Much of the same can be said in relation to the principle of purpose limitation.

It is then suggested that most often the evaluation of the interests of the data subject, in particular in the context of considering access to documents, most often logically leads to the evaluation of the effect and potential limitations to their right to privacy, which in these cases is the interest protected by data protection rules. Thus, the data protected from necessary and legitimate disclosure should comprise of ‘sensitive data’. ‘Sensitive data’ should include all personal data, that, if disclosed to third parties, could be reasonably expected to negatively affect the private life of the data subject, taking into consideration both the context of the data, as well as the case as a whole.

In regard to the conflict with the principle of purpose limitation, the reasoning appears to be that it is for the controller to show, in cases where it is requested access to the personal data, that the processing would be incompatible with the original purposes of the collection of the data. As the principle concerns itself with the foreseeability of the future processing in the eyes of the data subject, this remains problematic. One possible solution is that it would encompass only manifestly incompatible purposes, or those purposes going clearly against the

original purpose. This is however not ideal, as it would limit the privacy and data protection rights of the data subject to an extent that can be seen disproportionate.

Finally, it should be noted that as much of the analysis is based on the older legislative instruments, the adoption of GDPR will have an impact in the future interpretations by the Court. The GDPR removes the textual link to the right to privacy, although this can be circumvented by the remaining mention of “legitimate interests of the data subject”. It further appears to take a stronger stance on the right to purpose limitation, as well as to other rights of the data subject.

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